Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

VERONICE A. HOLT
Petitioner,

v.

KMI-CONTINENTAL, INC.
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER *ST. MARY'S HONOR CENTER V. HICKS* CREATES A SPECIAL STANDARD FOR SUMMARY JUDGMENT IN TITLE VII CASES WHICH PERMITS A DISTRICT COURT, OR COURT OF APPEALS, REVIEWING *DE NOVO*, TO TREAT AN EMPLOYER'S ARTICULATION OF LEGITIMATE NON-DISCRIMINATORY BUSINESS REASONS AS TRUE WHERE THE PLAINTIFF HAS SUBMITTED EVIDENCE PERMISSIBLE PURSUANT TO RULE 56(e), AFFIDAVITS, ADMISSIONS BY THE EMPLOYER, BUSINESS RECORDS AND SWORN TESTIMONY THAT DISPUTE THE TRUTH OF THE REASONS ASSERTED

II. WHETHER A FEDERAL COURT MAY DEVIATE FROM THIS COURT'S EXPRESS MANDATE THAT FEDERAL COURTS APPLY STATE TOLLING LIMITATIONS, AS WELL AS STATUTES OF LIMITATION, IN § 1981 CASES

LIST OF PARTIES

The names of the parties to the proceedings in the Courts whose judgment is sought to be reviewed here appear in the caption of the case. In 1982, the Equal Employment Opportunity Commission appeared as *amicus curiae* in an earlier related appeal between these parties.

KMI-Continental, Inc., is the successor in interest to The Continental Group, Inc., which was formerly known as Continental Can Company, Inc.

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Appendix C: Opinion and Judgment of the District Court for the District of Connecticut App.29

Veronice A. Holt respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, *see* Appendix A ("App. A") is reported at 95 F.3d 123 (1996). The memorandum opinion of the Court of Appeals denying rehearing (Appendix B) had not yet been assigned pagination in the Federal Reporter. The Opinion of the District Court for the District of Connecticut ("App. B") is unreported.

JURISDICTION

The court of appeals entered its judgment on September 4, 1996 (App. 1), and denied a timely petition for rehearing and rejected a suggestion for rehearing *en banc* on November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 1981 provides in relevant part.

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

42 U.S.C § 2000e provides in relevant part:

e-2 (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

***

e-3 (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this subchapter or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Connecticut General Statutes § 52-592 provides in relevant part:

(a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action

after a verdict for the plaintiff, the judgment has been set aside, of if a judgment or nonsuit has been rendered or a judgment for the plaintiff reversed, or, if the plaintiff is dead and the action by law survives, his executor or administrator may commence a new action except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment.

***

(c) If an appeal is had from any such judgment to the supreme court or appellant court, the time the case is pending upon appeal shall be excluded in computing the time as above limited.

(d) The provisions of this section shall apply ... to any action between the same parties ... for the same cause of action or subject of action brought to any court in this state, either before dismissal of the original action and its affirmance or within one year after the dismissal and affirmance, and to any action brought to the United States circuit or district court for the district of Connecticut which has been dismissed without trial upon it merits or because of lack of jurisdiction in such court. If such action is within the jurisdiction of any state court, the time for bringing the action to the state court shall commence from the date of dismissal in the United States Court, or if an appeal or writ of error has been taken from the dismissal, from the final determination of the appeal or writ of error.

Fed.Rul.Civ.P.Rule 56 provides in relevant part:

(b) For Defending Party. A party against whom a claim, counterclaim, or crossclaim is asserted ... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. *** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and **admissions on file**, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. " (Emphasis added)

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein

STATEMENT OF THE CASE

Petitioner respectfully suggests that this case presents substantive questions of federal law worthy of certiorari. Specifically, this case asked the Court to definitely elucidate pursuant to Anderson v. Liberty Lobby 477 U.S. 242 (1986) and St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993), the quantum of proof necessary for a Title VII plaintiff to survive a motion for summary judgment where the defendant employer has articulated reasons for its adverse employment decision, Secondly,

this case presents for determination, the proper application of this Court's decisions in ***Johnson v. Railway Express Agency,*** 421 U.S. 454, 463-464 (1974); ***Board of Regents v. Tomanio,*** 446 U.S. 478 (1980) requiring lower courts to apply state tolling provisions as well as state statutes of limitations in determining the statute of limitation actions brought pursuant to 42 U.S.C. § 1981.

A. Background

In 1976, Respondent, KMI-Continental, Inc. ("Continental") hired Petitioner, Veronice A. Holt, an African American female attorney, as Assistant General Counsel, for its Forest Industries business unit. In October, 1981, Holt, at that time Securities Counsel for Continental, filed a complaint with the Connecticut Commission on Human Rights and Opportunities, ("CCHRO") alleging unlawful discrimination in pay, promotion, and benefits because of her race and sex. On December 8, 1981, Holt filed a second complaint alleging retaliation for filing the initial charge. Prior to filing the initial charge, Holt had always been rated an outstanding employee, Continental's highest possible personnel rating.[1] By letter dated January 20, 1982, Continental discharged Holt who then

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[1] In its opinion the Second Circuit states that Holt received positive reviews. Holt swore, and Continental admitted, with one exception, that she received all "outstanding ratings". Continental asserted in an unsworn statement that Holt's July 1978 review was "superior to outstanding".

amended her CCHRO complaint to include a claim of retaliatory discharge. Petitioner also sought from the district court in Connecticut a preliminary injunction reinstating her pending the outcome of the administrative proceedings. Her request was denied. ***Holt v. Continental Group, Inc.,*** 542 F. Supp. 16, 17 (D. Conn. 1982). The Second Circuit reversed and remanded. ***Holt v. Continental Group, Inc.,*** 708 F.2d 87, (2d Cir. 1983), ***cert. denied,*** *465 U.S. 1030 (1984).* On remand, Petitioner, whose claims were still pending before the CCHRO, sought relief requiring the CCHRO and other state officials to expeditiously investigate and resolve her pending discrimination complaints. The district court dismissed the claims against the state officials, ***Holt v. Continental Group, Inc.,*** 631 F. Supp. 653 (D. Conn. 1985), denied the preliminary injunction in an unpublished opinion and dismissed the complaint. ***Holt v. Continental Group, Inc.,*** No. B-82 Civ. 119 (D. Conn. June 6, 1985), the Second Circuit affirmed and this Court denied certiorari. ***Holt v. Continental Group, Inc.,*** 788 F.2d 3 (2d Cir. 1986), ***cert. denied,*** 479 U.S. 839 (1986).

This Court denied certiorari on October 26, 1986. While Petitioner's application for certiorari was pending before this court, the Equal Employment Opportunity Commission ("EEOC") issued a right to sue letter on Holt's claims of discrimination in pay, benefits, and

promotion and on August 8, 1986, Petitioner timely filed suit on those claims. [2]

Seven years later, in February 24, 1993, the EEOC issued a right to sue letter on the retaliation claims and Petitioner timely filed suit on those claims.[3] The cases were consolidated and in May of 1994, both parties moved for summary judgment on all counts. Petitioner requested a hearing on the motions. On February 16, 1995, the District Court, without a hearing, granted Respondent's motion without reference to Petitioner's

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[2] Continental filed its answer on October 15, 1986 and Holt commenced discovery on November 5, 1986. On May 5, 1987, Holt moved to compel discovery. Her motion was resolved by an order to produce on October 24, 1988. In the interim, Defendant had two changes of counsel. Six days after the order to produce, Defendant again changed counsel. In October 1990, the Court approved a joint discovery order. Most of the documents relied upon by Holt in seeking admissions from Continental were eventually discovered after Respondent permitted her to make two trips to its Cleveland record storage and sort through hundreds of boxes of stored files. In November 1992, Plaintiff again moved to compel discovery which motion was granted in part and denied in part in February, 1993.

[3] The new case was assigned to a different judge in a different city and the cases were consolidated before the new judge. Plaintiff thereafter served on Defendant the fifteen sets of admissions based primarily upon the documents that had been produced by defendant.

motion. ***Holt v. KMI Continental, Inc.,*** No. B-86 Civ. 389 & 93 Civ. 619 (D. Conn. Feb. 16, 1995). Specifically, the Court granted summary judgment on Petitioner's Title VII claims and held that Petitioners § 1981 claims were barred by the statute of limitations. The Second Circuit affirmed and denied rehearing. ***Holt v. KMI Continental, Inc.,*** 95 F.3d 123 (1996)

B. Facts

Holt and Continental filed cross motions for summary judgment. In opposition to Continental's motion for summary judgment and in support of her motion, Holt presented the following evidence:

A. Affidavit in Opposition to Defendant's Motion for Summary Judgment
B. Plaintiff's Statement Pursuant to Local Rule 9(c)(2) in Opposition to Defendant's Statement of Material Facts as to Which There is no Genuine Issue of Fact
C. **Defendant's Responses to Plaintiff's 15 Sets of Request for Admissions**
D. Plaintiff's detailed Statement of Facts in her Motion for Summary Judgment and Rule 9(c)(1) Statement in Support of the motion.
E. Plaintiff's Verified Complaints
D. Two documents prepared by Continental stating that Holt was eligible in 1979 for promotion to General Counsel for Continental Forest Industries, a billion dollar business

E. Salary Summaries for all attorney's employed by the legal department as agreed upon by the parties
F. Sworn testimony from an attorney co-worker that in January of 1981, he had an excellent working relationship with Holt. Defendant admitted that Holt supervised specific activities performed by this attorney.

Defendant chose not to respond to Plaintiff's statement of material facts stating only that it maintained that there were no material issues of fact in dispute.

In fact, on critical elements, the facts as presented by Holt and Continental were diametrically opposite. For example on the retaliation charge, Holt, in her extensive submission, disputed by sworn statements and contemporaneous documents that she engaged in the conduct alleged in the January 20, 1982 letter.[4] For example, one of the articulated reasons that Defendant offered in its termination letter was:

"Without consulting either Mrs. Rein or me, you called Wilkie, Farr & Gallagher and directed them not

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[4] In response to Holt's several requests for admissions regarding work performed by her after the filing of her charge, Continental stipulated that, with respect to Holt's discharge, except for the conduct set forth in its January 20, 1982 letter to Holt, "neither the plaintiff's competence nor her performance were at issue"

to perform work the General Counsel had specifically asked them to do."

Continental's "evidence" in support of this allegation, the statements of her supervisor who was not a party to the conversation was pure hearsay and insufficient under Rule 56(e).[5] Holt in an affidavit stated that "I did not tell Steve Flood of Wilkie, Farr to cease doing due diligence. Mr. Flood informed me that he had completed his due diligence."

Similarly, Continental alleged and the District Court found that Holt had disrupted the legal department by "...forc[ing]" another lawyer in the department to relinquish the only word processor available for her personal use."[6] Holt swore that she usually typed most of her own work on the word processor which was one of two in the office and she had agreed not to hire a temporary during her secretary's absence. When another attorney said she needed the machine, Holt suggested that she use the other machine. The other attorney did

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[5] In the fifteen years of this litigation, Continental has never proffered a sworn statement from Steven Flood that Plaintiff actually made this statement to him. Indeed when Holt subpoenaed Flood during the preliminary injunction hearing, Defendant successfully quashed the subpoena.

[6] The District Court erroneously attributed this conduct to William Sisley. In actuality, it was Patricia Deltoro Heck, the attorney assigned by Continental to represent it in defending against Holt's charge.

not say anything else. Further, to prove that she was not typing anything "personal", Holt produced the memorandum that she typed to the "Personnel Department" as well as another memorandum on "Dividend Reinvestment Plans". Likewise, Holt countered Continental's allegations regarding her failure to communicate with her supervisor concerning her work assignments with four written memoranda from Holt to her supervisor concerning her work assignments during the three month period proceeding her discharge.

Holt further supported her retaliation claim with undisputed circumstantial evidence. All of the facts asserted by Continental in support of Holt's termination, and denied by Holt, occurred after the filing of Holt's discrimination charge. KMI admits that Holt is the only attorney that has ever been summarily terminated without a written warning that her conduct subjected her to termination.[7] An attorney who worked pursuant to Holt's supervision during this period testified that he had an excellent working relationship with her.

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[7] Continental also admits that a white male who admitted in writing that he was unable for three years to comply with its directive that he rewrite the business descriptions in the 10-K was not terminated. Continental admits that Holt successfully performed this assignment. Continental also admitted that "for performance reasons", Lee Rettig, whose salary it compared to Holt's, "last received a salary increase on July 1, 1978 and did not receive any further increases during the remainder of her employment."

On the job tracking charge, Plaintiff submitted her own sworn testimony that on several instances, she participated in the hiring process for new lawyers and that in each instance, only minorities and females or white males were interviewed. Holt also swore that her immediate supervisor informed her that personnel agencies had been instructed to send only white male applicants for a position reporting to her. Holt further swore that all applicants that she interviewed for the job were in fact white males. Continental says it has no record of the race and sex of the applicants for these positions. What is undisputed is that a white male attorney at Forest Industries was replaced by a white male. Holt, an African American female, was replaced at Forest Industries by a African American male. A white female attorney on the corporate staff whose employment was terminated was replaced by a white female attorney. A black male attorney on the corporate legal staff was replaced by an attorney of black and Hispanic ancestry. When Holt was involuntarily terminated, the same black male who replaced her at Forest Industries, was transferred to the corporate legal staff.

To support her charge of salary discrimination, Holt submitted documents and admissions that established that at every point in her five year employment with Continental, her salary, benefits, and, in one instance, her job grade were less than white males similarly situated. Continental admitted that when Holt, the first African American in the history of the company to attain a job grade C2, became a Corporate Counsel II, the Vice President and General Counsel and the Vice President for

Industrial Relations personally decided to pay Holt beneath the minimum salary range for her position.

Holt also presented evidence that between 1977 and 1982, three other female corporate staff employees had filed charges of discrimination against Continental, and a fourth female had filed a charge alleging retaliatory discharge.

Finally, it is undisputed that prior to Holt's allegation, courts in other jurisdictions found that Continental had intentionally violated equal employment opportunity laws, specifically the District Court of Virginia in ***United States v. Continental Can Company,*** 319 F.Supp. 161, 3 E.P.D. Para. 3050 (D.C. Vir. 1970) and the District Court of Georgia, ***Miller v. Continental Can Company, Inc.,*** 544 F.Supp. 210, 25 E.P.D. 31,543 (D.C. Ga. 1981). [8]

With respect to the Management Incentive Plan (MIP), Continental's bonus plan, Continental admitted that every person prior to Holt employed in a job grade C2 received a bonus. The Second Circuit relied upon the General Counsel's statement made in response to the Plaintiff's CCHRO complaint that she amended the MIP

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[8] *See also* ***Holmes v. Continental Can Company,*** 28 Fair Empl. Prac. Cas. (BNA) 1539 (ND. Ma. S.D. 1980); rev'd 706 F.2d 1144 25 E.P.D. Para. 31,490. and***Continental Can Company, Inc., v. State of Minnesota,***297 N.W. 2d 241, 23 E.P.D. 30,997 (Minn. 1980)

for the legal department to exclude job grade C2. Holt relied upon Continental's 1981 written plan which stated that participation is determined by salary grade levels and that the grade levels for a B MIP are grades C-1 through C-5. The plan also specifically made participation in the plan subject to the approval of the President. The President never approved an African American for participation in the MIP.[9] Continental admitted that "the guidelines for 1981 suggest that assigned grade level in the salary structure is the basic determinant for participation level."

Plaintiff also submitted a Report on Retention of Black Exempt Personnel dated June 19, 1978 authored by Continental's personnel director. His study concluded that from the viewpoint of African American employees, they do not remain in Continental's employ because the real indicators of success "pay and promotion are not available to blacks on an equal basis." The report also concluded that "it is believed" that exempt-level African Americans employed by Continental on its corporate staff were underpaid and undergraded.

Finally, Continental admitted that Holt's final salary of $57,500 that it and the lower courts used for compari-

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[9] Plaintiff presented evidence from Continental's personnel files that four African American male employees were eligible for participation in the MIP, but none were awarded participation. One resigned eight days after his supervisor's request to award him participation was denied.

son purposes was the result of a $5,250 increase on January 21, 1982, the day after the January 20, 1982, termination letter. Continental specifically admitted that "on January 1, 1982, Holt and Heck (a white female) were in the same salary grade (C2), Holt's salary was $52,250, Heck's salary was $72,000 and that Heck's salary was approximately $19,750 (30.3%) more than Holt's."[10] Continental also admitted that Heck, although she graduated from law school a year before Holt, did not have any supervisory responsibility with regard to other lawyers.[11]

Although Continental portrayed Holt in its moving papers as a low level employee, "..of unfettered and

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[10] Continental also admitted that on January 1, 1981 "Heck was hired [as a Corporate Counsel II] at a salary of $65,200, a salary approximately $20,200 (44.9%) higher than the $45,000 paid to Holt when she was transferred to the position of Corporate Counsel II, on April 1, 1980.) The second circuit erroneously compared Heck's 1981 salary to Holt post termination 1982 salary.

[11] Continental admitted that Holt supervised an attorney's work on financings and that another attorney was assigned to assist Holt with specific assignments. Further, Judge Ellen B. Burns U.S.D.J. specifically found in her ruling on Plaintiff's request for a preliminary injunction that "During his examination [an attorney] acknowledged that plaintiff bore ultimate supervisory responsibility for the project and did some editing of [an attorney's} work."

unrealistic ambition", it admitted that as part of its succession planning process, it reviewed "employees who were rated as promotable to high level management positions" and considered to be "high potential", and that in 1979, Holt was one of three attorneys considered to be "high potential".

Continental also admitted in response to Holt's request for admissions that her immediate supervisor, the Associate General Counsel, sent to each employee on the corporate legal staff a job description for Holt's position as Securities Counsel, which stated that Holt had "OVERALL RESPONSIBILITY for legal aspects of securities law compliance, financing matters and financial reporting. These functions are to be performed either directly or in a supervisory capacity."[12] Indeed, Holt's performance review listed as one of her job responsibilities "Supervise the securities and financing work of other attorneys".

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[12] After Holt filed her retaliation charge, her superiors disavowed this description and said that it did not state her job description. Indeed, they denied under oath having distributed it. Continental later admitted that Holt's immediate superior had distributed the job description. It also admitted that "...its records indicated that the criteria for the performance review are similar to the objectives and responsibilities stated in the Securities Counsel job description."

C. The Opinions Below

In the District Court, Holt specifically asserted that "nothing in ***Hicks,*** may be taken to suggest that the Court may grant summary judgment on the question of intent when the evidence is contested." Continental asserted that it was entitled to summary judgment because all of its "decisions were entirely legitimate and non-discriminatory and because Holt can offer no **credible** evidence of discrimination or retaliation". The District Court, accordingly interpreted ***Hicks*** to mean that once the employer has articulated legitimate non-discriminatory reasons, that is the end of the inquiry. With one exception (the alleged retaliatory threats by Rein), which it found to be non-material, the District Court gave no legal effect whatsoever to Holt's affidavit and sworn testimony, or Continental's business record and admissions which disputed its articulated legitimate non-discriminatory reasons. It referenced two or three non-factual conclusory statements from Holt's memorandum of law and initial complaint and one quote from Holt's deposition.

Again in the Second Circuit, Holt asserted that nothing in ***Hicks*** suggest a court may grant summary judgment when the evidence is contested. On the retaliation claim, the Second Circuit, in its *de novo* review, without giving any legal effect to Holt's submissions affirmed summary judgment based upon Continental's...

> "**proffered evidence which suggests** that Plaintiff had difficulty working with her co-workers and supervisors. **The district court correctly found that**

> **Continental articulated several legitimate reasons** why Holt was fired. She was disruptive, there had been complaints by clients; she did not take direction from her supervisors. *** Her supervisor warned her of her disruptive conduct. "[13] **(Emphasis added)**

On the promotion and pay claims, the Second Circuit, like the court below, simply ignored the salary data stipulated to by both parties, ignored the fact that Holt, unlike Heck, had supervisory responsibility, accepted Continental's interpretation of the data, and used Holt's post-termination salary increase for comparison purposes.[14] The Second Circuit never suggested that the data was uncontested, but that it "supports" Continental's position.

On the MIP, the Second Circuit, although given pause by Holt's allegations, accepted Continental's factual proffer and ignored Continental's actual business records and admissions. Furthermore, it found that Holt made

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[13] Holt's immediate superior stated that he prepared a warning letter, which Continental admits was never delivered to Holt. Holt denied under oath he had ever warned her that her conduct subjected her to termination.

[14] The Court of Appeals also created a chart (App.20) for comparison purposes which shows Holt with three years of experience in 1980, seven years after her graduation from law school. The chart omits Holt's four years employment with Continental.

$13,000 less than Heck, even though Continental admitted that Holt's salary was $19,000 less than Heck's.

REASONS FOR GRANTING THE PETITION

I. IN A TITLE VII CASE WHERE AN EMPLOYEE SUBMITS EVIDENCE IN A FORM PERMISSIBLE PURSUANT TO RULE 56(e) CONTRADICTING THE EMPLOYER'S ARTICULATED NONDISCRIMINATORY LEGITIMATE REASONS FOR AN ADVERSE EMPLOYMENT ACTION, AS WELL AS CIRCUMSTANTIAL EVIDENCE SUPPORTING A CLAIM OF PRETEXTUALITY, A COURT MAY NOT GRANT SUMMARY JUDGMENT FOR THE EMPLOYER

In this Title VII case, the Second Circuit, in formulating its test for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure[15] excluded both in its definition and in its reasoning this Court's definition of materiality in ***Anderson v. Liberty Lobby*** 477 U.S. 242, 248 (1986).

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the

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[15] There is no satisfactory basis for giving Title VII actions a special status under the Rules of Civil Procedure. *See, **Baldwin County Welcome Center v. Brown***, 466 U.S. 147 (1984)

> governing law will properly preclude the entry of summary judgment. ***"

In another case decided on the same day as ***Anderson, supra***, ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986), this Court further defined "no genuine issue as to any material fact" as a "fail[ure] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. "

The Second Circuit properly identified this Court's decision in ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 113 S.Ct. 2742 (1993) as establishing the substantive law to apply. It correctly identified the elements of a *prima facie* case in accordance with ***McDonald Douglas Corp. v. Green***, 411 U.S. 792, 93 S.Ct.1817 (1973) and with respect to most of Holt's charges found that she had made out a *prima facie* case. Further, the Second Circuit correctly identified the shift of the burden to Continental to articulate, not prove, that it had legitimate, non-discriminatory reasons for its adverse employment action. The Second Circuit, however, ceased its inquiry at the point that the employer articulated legitimate reasons and failed to consider on a motion for summary judgment whether the stated reasons were controverted by evidence in a form permissible pursuant to Rule 56(e). It completely ignored the express holding of ***St. Mary's Honor Center*** regarding the effect of a finding that the proffered reasons are false.

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination [footnote omitted] and the Court of Appeals was correct when it noted, that upon such rejection, '[n]o additional proof of discrimination is *required*." (*Emphasis in original*) ***St. Mary's Honor Center***, supra, 113 S.Ct. at 2749.

Pretextuality, the third element of the ***McDonald Douglas*** inquiry, is a material question of fact. Where the employer articulates a lack of pretextuality and the employee submits evidence in an admissible form to rebut the reasons articulated by the employer, a genuine issue of material fact is presented. As this Court stated in ***United States Postal Service Board of Governors v. Aikens***, 460 U.S. 711, 716 (1983) quoting ***Burdine.***[16]

> "The plaintiff retains the burden of persuasion... [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or **indirectly by showing that the employer's proffered explanation is unworthy of credence.** "

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[16] ***Texas Dept of Community Affairs v. Burdine,*** 450 U.S. 248 (1981).

Other Circuit Courts of Appeals have accepted and incorporated the quoted language from ***St. Mary's Honor Center*** in setting standards for reviewing grants of summary judgment to employer's. The Third Circuit, reversing summary judgment for the employer, in ***Kowalski v. L&F Products,*** 82 F.3d 1283, 1289 (3rd Cir. 1996) a retaliatory discharge case pursuant to the Employment Retirement Income & Security Act, recently stated:

> "To survive judgment when the defendant articulates a legitimate, non-discriminatory reason for the discharge, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could either (1) disbelieve the employer's articulated legitimate reasons, or (2) believe that an individual discriminatory reason was more likely than not reason for the discharge. [The plaintiff's burden is] to put forth evidence demonstrating that the employer's proffered non-discriminatory reason was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is the proffered reason is a pretext). (citation omitted.)"[17]

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[17] The Third Circuit had correctly articulated the standard in reversing summary judgement in an earlier ADEA case, ***Sorba v. Pennsylvania Drilling.,*** 821 F.2d 200, 202 (3rd Cir. 1987). "It is clear that the employer will be able to 'articulate' a legitimate, non-discriminatory reason for Sorba's dismissal. (*citations omitted*) Therefore Sorba's trial

(continued...)

The Fifth Circuit in ***Nowlin v. Resolution Trust Corporation,*** 33 F.3d. 498, 507 (5th Cir. 1994), post ***St. Mary's Honor Center***, reversed the district court's grant of summary judgment for the employer in a retaliatory discharge case in which the employer proffered an economic motive for the discharge,

> "...the plaintiff must prove that the legitimate reason articulated by the defendant was false and that the defendant's real reason for discharging the plaintiff was discriminatory or otherwise prohibited by Title VII."

The Ninth Circuit in ***Yartzoff v. Thomas,*** 809 F.2d 1371, 1377-1378, ***cert denied,*** 498 U.S. 939 (9th Cir. 1987) reversed a grant of summary judgment even in the face of the defendant's "strong evidence" showing legitimate reasons. Following complaints of discrimination, the plaintiff experienced a series of adverse employment decisions, including lowering of his personnel rating and transferring his job responsibilities away from him.

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[17](...continued)
burden will include the requirement either to discredit the employer's proffered reasons or to prove by direct evidence that his age was a factor in the decision to dismiss him.*** The evidence contains indirect evidence which, if credited by the factfinder at trial, would be sufficient to support a finding that it is more likely than not that the employer did not act for its proffered reasons."

These adverse employment decisions during a two-year period "is itself probative of pretext."

Finally, the Eleventh Circuit in ***Rollins v. Techsouth, Inc.,*** 833 F.2d 1525, 1531 (11th Cir. 1987), reversed a grant of summary judgment to an employer where the district court "necessarily had to *accept* [the employer's] version of the story and *discredit* [the employee's] version."

Further, although Holt presented direct evidence controverting Continental's articulation of non-discriminatory reasons, a Title VII claimant is not restricted to one form of proof to demonstrate pretextuality. "[e]vidence ... of pretextual[ity] may take a variety of forms." ***Patterson v. McLean Credit Union***, 491 U.S. 164, 187 (1989). As the Sixth Circuit recently reiterated in ***Talley v. Bravo Pitino Restaurant, Ltd,*** 61 F.3rd 1241, (6th, 1995) reversing an award for summary judgment in a Title VII discriminatory discharge case, "There are no hard and fast rules as to what evidence is needed to establish pretext. (*citation omitted*)". In ***Charlton v. Paramus Board of Education,*** 25 F.3rd 194 (3rd. Cir. 1994), ***cert. den.*** U.S. , 115 S.Ct. 590 (1994), the Third Circuit reversed a grant of summary judgment where the timing of the action would support an inference that the adverse action was in retaliation for filing a Title VII suit. Further, although it ought to be expressly obvious based upon the plain wording of Rule 56(e) that a Title VII plaintiff's sworn testimony is sufficient to raise a factual issue, the Fourth Circuit has

expressly so held, ***Amirmokri v. Baltimore Gas and Electric Company***, 60 F.3rd 1126 (4th. Cir. 1995)[18]

Only one other circuit court, The First Circuit, appears to have adopted a standard in employment discrimination cases that permits summary judgment where the employee has presented evidence that the employer's articulated reasons of business necessity are false. ***Mesnick v. General Electric. Co.***, 950 F.2d 816, 822 (1st Cir.1991) ***cert. denied*** 504 U.S. 985 (1992) "It is not enough for the employee to impugn the veracity of the employer's justification. The First Circuit, did, however, agree that circumstantial evidence, including timing, could be used by a Title VII plaintiff to show pretext.

Continental admitted that its only reasons for discharging Holt were the reasons stated in the January 20, 1982. Unless those reasons were true, it had absolutely no reason, other than retaliation, to discharge Holt. Holt proffered substantial evidence admissible pursuant Rule 56(e) to contradict the truth of the employers stated reasons. Moreover, there was a wealth of circumstantial evidence from which a trier of fact could find that Continental acted with intent to discriminate. On the retaliation charges, the timing itself was strong proof. Within three months of Holt filing discrimination charges, plaintiff suffered a series of adverse employment

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[18] *See also* ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144 (1970)

actions, defendant disavowed her job description, cancelled the hiring of an employee who was to report to her, attempted to reassign her job functions, lowered her personnel rating by two grades and summarily terminated her without notice. The stipulated facts regarding the salaries of lawyers in the law department make it clear that there is no relationship between salary and years out of law school. The only constant in the salary structure among lawyers was that Holt's salary and benefits were always beneath that of white attorney's and there was evidence that her superiors purposefully agreed to maintain Holt's salary beneath her job grade and beneath that of white employees.

Under the law in any circuit, other than the Second,[19] Continental clearly would not be entitled to summary judgment just because it articulated some reasons, which, if true, would permit a finder of fact to find in its favor.

II. THE SECOND CIRCUIT FAILED TO ACCEPT AND ADHERE TO THIS COURT'S UNAMBIGUOUS PRIOR HOLDINGS REQUIRING FEDERAL COURTS TO APPLY STATE

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[19] While the First Circuit apparently would have considered Holt's denial of the acts listed in the January 20, 1982 letter as irrelevant on a motion for summary judgment, it would have considered the circumstantial evidence, the timing of the termination and the evidence that Continental had never summarily terminated another lawyer as creating a triable issue.

TOLLING LAWS, INCLUDING QUESTIONS OF APPLICATION, WHEN BORROWING STATE STATUTES OF LIMITATIONS

This Court held in ***Johnson v. Railway Express Agency,*** 421 U.S. 454, 464 (1974) that § 1981 claims are not tolled by the filing of charges with the Equal Employment Opportunity Commission This Court further stated:

> "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim."

Subsequently, this Court held in ***Robertson v. Wegman,*** 436 U.S. 584 (1978), that federal courts must apply state survivorship rules in a § 1983 case even where state law would result in abatement of the federal cause of action. These rulings were reaffirmed in ***Board of Regents v. Tomanio,*** 446 U.S. 478 (1980) in which this Court required the Second Circuit to apply New York tolling provisions to a §1983 claim.

The Second Circuit, pursuant to ***Goodman v. Lukens Steel Company,*** 482 U.S. 656 (1987), applied the correct Connecticut three year statute of limitations, Conn. Gen. Stat. Ann. § 52-577 (West 1991). It, however, 1) incorrectly applied Connecticut law in holding that the dismissal of Holt's request for a preliminary injunction was a dismissal on the merits within the meaning of

Connecticut's savings statute, Conn. Gen. Stat. Ann § 52-592; and 2) refused to apply Connecticut law holding that § 52-577 is a personal and procedural statute of limitations and is waived if not specifically pled.[20]

Under Connecticut law, as stated in ***Legassey v. Shulansky***, 28 Conn.App. 653, ___, 611 A.2d 930, 933 (1992), a judgment based upon unavailable or inappropriate relief is not a judgment on the merits. Without a doubt, if the judgment in the suit for injunctive relief was not a judgment on the merits, Holt's § 1981 claims are saved. This action was filed prior to the date this Court denied certiorari in the prior action.

Further, in ***Orticelli v. Powers,*** ___ Conn.App. ___, 495 A.2d 1023, 1028 (Conn. 1985), the Supreme Court of the State of Connecticut reversed a grant of summary judgment holding that "§ 52-577 is procedural, not jurisdictional, and thus may be waived." The fact that § 52-577 has been held as the operative statute of limitations in a § 1983 action *** does not obviate the need to plead the statute as a special defense."

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[20] Continental did not plead the statute.

CONCLUSION

For all the reasons stated herein, Petitioner prays this Court grant her petition for a writ of certiorari.

February 10, 1997

Respectfully submitted,

/s/ Veronice A. Holt
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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Nos. 655 August Term, 1995

(Argued December 19, 1995
Decided September 4, 1996)

Docket No. 95-7297

VERONICE A. HOLT,
Plaintiff-Appellant,

v.

KMI-CONTINENTAL, INC.,
Defendant-Appellee.

Before: KEARSE, MINER AND PARKER, Circuit Judges.

Plaintiff, pro se, appeals from an order and judgment of the United States District Court for the District of Connecticut, Alfred V. Covello, Judge, granting defendant's motion for summary judgment in an employment discrimination case brought pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Affirmed.

Veronice A. Holt, Pro Se, Washington, D.C.

Lisa J. Damon, Hartford, CT (Albert Zakarian, Day, Berry & Howard, Hartford, CT, of counsel), for Defendant-Appellee.

PARKER, Circuit Judge:

I. BACKGROUND

Veronice A. Holt, a black female attorney, appeals from a judgment of the District Court of Connecticut (Alfred V. Covello, Judge) dismissing her complaint brought under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994), and 42 U.S.C. § 1981 (1994). Plaintiff sued defendant, KMI-Continental, claiming that defendant discriminated against her in the terms and conditions of her work because of her race and sex in violation of Title VII and § 1981. The district court dismissed all of plaintiff's pay discrimination claims because it determined that they were barred by the statute of limitations applicable to § 1981 and (although it was not pled) to the Equal Pay Act. Finding no genuine issues of material fact, the court granted defendant's motion for summary judgment on plaintiff's Title VII claims of discrimination in promotions, job tracking, and retaliation.

For the reasons that follow, we affirm the district court's dismissal of the § 1981 claim as well as the claim of discrimination in promotions and job tracking, and the retaliation claim. The district court erred, however, when

it failed to consider the merits of plaintiff's Title VII pay discrimination claim after holding that the § 1981 pay discrimination (and unpled Equal Pay Act) claims were time barred. After reviewing the merits of the defendant's motion for summary judgment on the pay discrimination claim, we hold that plaintiff has not demonstrated that defendant's explanation for any pay discrepancy is pretextual. We grant defendant's motion for summary judgment on this alternative ground.

A. Procedural History

This is the third time plaintiff appeals to this court. In order to make some sense of what has happened thus far, a review of the procedural history of the case follows.

In October of 1981, while still employed at Continental, Holt filed a complaint with the Connecticut Commission on Human Rights and Opportunities ("CCHRO") alleging that Continental had unlawfully discriminated against her in pay, promotions, and benefits because of her race and sex. Two months later, Holt filed a second complaint with the CCHRO alleging retaliation. On January 22, 1982, defendant discharged plaintiff. On February 3, 1982, Holt amended her CCHRO complaint to include a claim of retaliatory discharge. On February 16, 1982, Holt filed a complaint in federal district court under Title VII and § 1981. Plaintiff sought the sole relief of a preliminary injunction reinstating her to her position with Continental pending the outcome of the administrative proceedings before the CCHRO. The district court denied the preliminary injunction and

dismissed the complaint because plaintiff had failed to demonstrate either likelihood of success on the merits or irreparable harm required for injunctive relief. *Holt v. Continental Group, Inc.*, 542 F. Supp. 16, 17 (D. Conn. 1982).

This court reversed and remanded because the district court had not considered whether defendant's allegedly retaliatory discharge of plaintiff could have a chilling effect on other individuals considering pursuing relief under Title VII or § 1981, or on witnesses who might testify on behalf of plaintiff, thus satisfying the irreparable injury requirement for a preliminary injunction. *Holt v. Continental Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983), cert. denied, 465 U.S. 1030 (1984).* In addition, the court explained that if plaintiff wanted to pursue her § 1981 action for damages, she should amend her complaint so it could be considered on the merits if the court denied the preliminary injunction motion. Id. at 92.

On remand, plaintiff chose not to amend her complaint to add a § 1981 claim for damages. However, she added § 1981 and § 1983 claims against various state officials. The district court dismissed the claims against the state officials, *Holt v. Continental Group, Inc.*, 631 F. Supp. 653 (D. Conn. 1985), denied the preliminary injunction in an unpublished opinion and dismissed the complaint. *Holt v. Continental Group, Inc.*, No. B-82 Civ. 119 (D. Conn. June 6, 1985). Plaintiff appealed and this court affirmed by summary order. *Holt v. Continental Group, Inc.*, 788 F.2d 3 (2d Cir. 1986), *cert. denied,* 479 U.S. 839 (1986).

On August 6, 1986, the Equal Employment Opportunity Commission ("EEOC") issued a right to sue letter on the claims of discrimination in pay, benefits, and promotion. Plaintiff filed suit on August 8 on those claims. [1]

On February 24, 1993, the EEOC issued a right to sue letter on the retaliation claims. On March 25, 1993, plaintiff filed suit on those claims.[2] On September 15, 1993, the district court granted Continental's motion to

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[1] Plaintiff's complaint indicates that the right to sue letter was issued on May 7, 1986 and that she received it on May 20, 1986. The district court's opinion states that plaintiff received her right to sue letter on August 6, 1986. Although a copy of the right to sue letter is not in the record, it is quite possible that the district court erroneously used the August 6, 1986 date. In addition, although plaintiff's papers suggest that suit was filed on August 6, 1986, the docket sheet indicates that the complaint was actually filed on August 8, 1986. Any difference is immaterial since in either instance suit was filed within 90 days of receipt of the right to sue letter, the statutory requirement in a Title VII case. See 42 U.S.C. § 2000e-5(f)(1)

[2] The district court's opinion erroneously states that plaintiff received her right to sue letter on April 5, 1993, eleven days after suit was filed; the record supports plaintiff's version of the dates in this instance.

We note that it is unclear why four years elapsed before the EEOC issued plaintiff a right to sue letter on the discrimination claims, much less why it took seven more years before plaintiff received a right to sue letter on the retaliation claim.

consolidate the two cases. Both parties filed motions for summary judgment and the court granted defendant's motion on all counts. *Holt v. KMI Continental, Inc., No.* B-86 Civ. 389 & 93 Civ. 619 (D. Conn. Feb. 16, 1995). This appeal followed.

B. Facts

Holt is a black female attorney. She graduated from George Washington law school in 1973. In 1976, Continental hired her to work in the legal department of a subsidiary, Continental Forest Industries ("CFI"), as Assistant General Counsel. Her starting salary was $26,000, which was higher than her previous salary and consistent with her three years of work experience. During her tenure at Continental, plaintiff repeatedly complained that her salary was lower than those of her colleagues. Defendant attempted to alleviate plaintiff's concerns, often awarding her substantial raises. She was being paid $57,500 at the time she was terminated in 1982.

Although Holt received significant raises while employed by defendant, she was not permitted to participate in the Management Incentive Plan, ("MIP") the company's bonus program. Prior to a 1979 revision, the company permitted all attorneys to participate in the MIP. The revision resulted in higher salaries for attorneys, so Continental could more readily compete for legal talent, but fewer people were eligible for participation in the MIP. Following this revision, defendant did not permit attorneys with a C-2 salary grade to participate in the

MIP with the exception of C-2 level attorneys who were participating prior to the revision and were "grandfathered" into the program. Neither Holt nor any other black employees met the eligibility requirements of the MIP program.

During Holt's tenure, three promotional opportunities became available. Holt sought out each promotion, and although she received other promotions, she was not awarded any of these particular promotions. She argues that the defendant's promotional policies were discriminatory because defendant filled each of the positions with a white colleague or left it unfilled.

The first position to become available was for an Associate General Counsel at CFI. Plaintiff's supervisor told her that she was not yet ready for the position, although she received a qualified evaluation for it. The position remained unfilled and various components of the job were delegated to other employees. A short time later, defendant promoted Holt to Corporate Counsel II at CGI, another of the subsidiaries. When plaintiff became discontented with the Corporate Counsel II position, defendant offered her two options for promotion. She ultimately accepted a new position as Securities Counsel.

The second promotion, which plaintiff did not receive, was Corporate Secretary of CGI. Defendant promoted William Sisley, a white male, who had four years more experience than Holt. The third position that became available was Assistant General Counsel of CGI.

Defendant told Holt she was not yet ready for the position. The position remained vacant until after Holt was terminated. Defendant eventually gave the promotion to Patricia Heck, a white woman with more experience than Holt.

In support of her retaliation claim, Holt relies on the following evidence. Holt filed a complaint with the CCHRO in October 1981 claiming that Continental had discriminated against her in pay, benefits, and promotion because of her race and sex. Throughout her tenure with Continental, Holt received positive performance reviews. However, in December of 1981, Holt's performance review was "fully satisfactory," two levels below her prior rating. Plaintiff filed another complaint with the CCHRO two days later claiming retaliation. Defendants respond that in January of 1982, the problems between plaintiff and defendant escalated. Two company executives complained about plaintiff's performance. One of the executives indicated that he was uneasy working with plaintiff. Without the proper authority, plaintiff unilaterally fired outside counsel and then hired new outside counsel. Defendants also maintain that plaintiff was disruptive in the office and was unable to get along with her colleagues. For example, plaintiff apparently demanded that a colleague, who was working on a business matter under deadline, relinquish access to the only available word processor so that she could work on a personal matter. After discussing these and other problems with plaintiff, defendants determined that plaintiff was no longer suited to her position. On January 20, 1982, plaintiff was fired.

II. DISCUSSION

We review the grant of summary judgment *de novo* under the same standard applied by the district court. *Taggart v. Time Inc.*, 924 F.2d 43, 45-46 (2d Cir. 1991). A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must resolve all ambiguities and draw all inferences in favor of the non-moving party. Id. at 255. If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). With these principles in mind, we review the opinion below.

A. Discriminatory Denial of Promotions and Job Tracking

Plaintiff alleges that defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by intentionally discriminating against her on the basis of her race and sex. The analytical framework for evaluating a claim of discrimination in violation of Title VII is well established. We apply the three step burden shifting analysis enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502,

506-08 (1993); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995). Initially, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53. Second, assuming the plaintiff demonstrates a prima facie case, the burden of production shifts to the employer to articulate a legitimate, clear, specific and nondiscriminatory reason for refusing to promote the employee. See *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219, 1226 (2d Cir. 1994). Third, if the defendant satisfies this burden of production, the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for discrimination. *Hicks*, 509 U.S. at 515; *Gallo*, 22 F.3d at 1225.

In order to survive a motion for summary judgment, at the third step plaintiff must put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's sex or race was the real reason for the discharge. *Viola v. Philips Medical Systems of North America*, 42 F.3d 712, 717 (2d Cir. 1994). The plaintiff has the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against her on account of her sex and race. See Gallo, 22 F.3d at 1224.

Plaintiff contends that the district court erred when it granted defendant's motion for summary judgment on her claim of discriminatory denial of promotions. The court held that plaintiff failed to demonstrate that the

defendant's asserted reason for denying her the promotions was pretextual. We agree that plaintiff has not demonstrated pretext and affirm the district court on this issue.

With respect to the Associate General Counsel position with CFI, plaintiff cannot make out a prima facie case because defendant did not seek applicants to fill the position. Instead, the duties were delegated to other attorneys. Since plaintiff has not made out a prima facie case, her claim of discrimination fails. See *McDonnell Douglas,* 411 U.S. at 802.

Plaintiff did make out a prima facie case for her other promotion claims by showing that she is a member of a protected class, a black female; that she applied for the positions; that she was qualified for the positions; and that the positions were filled by a white male and a white female.

Defendant then articulated legitimate, non-discriminatory reasons for refusing to promote Holt. Defendant awarded the second promotion, for Corporate Secretary of CGI, to William Sisley, a white male, rather than Holt. Defendant explains that Sisley had significantly more experience than Holt, and thus was better qualified for the promotion. Defendant refused to promote Holt to Assistant General Counsel for CGI because she was not yet qualified for the position. Some time after defendant terminated Holt, defendant promoted Patricia Heck, who had more experience than Holt. The evidence that defendant filled these two

positions with white applicants who were more qualified than plaintiff rebuts any presumption of discrimination. *Patterson v. McClean Credit Union,* 491 U.S. 164, 187 (1989).

Plaintiff failed to put forth any evidence to suggest that defendant's articulated non-discriminatory reasons are pretextual. She has not shown, for example, that others with equal or less experience were promoted, or that the defendant had a policy of promoting based on anything other than experience. She attempts to show pretext by asserting her personal belief that she was the most qualified person for the various positions. Her opinion, however, is belied by the facts which indicate that the people who received the promotions had more experience than plaintiff. Since none of the evidence suggests that a genuine issue of material fact remains concerning defendant's articulated reasons, the district court properly granted summary judgment for the defendant.

Plaintiff's claim that defendant only interviewed whites for "white" positions and blacks for "black" positions is without any evidentiary support. On the record before us, no reasonable inference could be drawn in favor of the plaintiff on a material issue of fact regarding the job tracking claim. The district court properly granted summary judgment on this issue.

B. Retaliation Claim

Plaintiff asserts that defendant retaliated against her because she filed complaints with the CCHRO and the EEOC. The district court determined plaintiff had not shown that defendant's legitimate, non-discriminatory reasons for terminating plaintiff were pretextual. We agree with the district court's reasoning on this issue and affirm the grant of summary judgment.

A prima facie case of retaliation under Title VII requires the plaintiff to show "[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995); see also *Kotcher v. Rosa & Sullivan Appliance Ctr.*, Inc., 957 F.2d 59, 64 (2d Cir. 1992). Upon such a showing, the defendant must articulate legitimate non-discriminatory reasons for its actions, whereupon the plaintiff bears the burden of showing that the defendant's explanations are pretext for the true discriminatory motive. *Tomka*, 66 F.3d at 1308.

On October 22, 1981, plaintiff filed a complaint with the CCHRO. Plaintiff contends that after she filed the complaint, her performance reviews suffered. Defendant explains that plaintiff was in a new position and that she received an acceptable evaluation of "fully satisfactory." Plaintiff offers no evidence that the review was retaliatory. She further alleges that the denial of promotion and refusal to hire an attorney to work with

her in the Securities Department was retaliatory. The promotion claim has been addressed above. Defendant explains that it decided not to hire an attorney to work with Holt in the Securities Department due to a company-wide hiring freeze. Plaintiff presents no evidence that defendant's articulated explanation is pretextual. We also note that plaintiff received at least one significant raise after she filed her first complaint with the CCHRO, suggesting that defendant was not retaliating against her.

Finally, plaintiff contends that defendant fired her in retaliation for filing her complaint. Defendant came forward with several legitimate reasons for the decision to fire plaintiff. Defendant received complaints from company executives about plaintiff's performance. In addition, defendant proffered evidence which suggests that plaintiff had difficulty working with her co-workers and supervisors. The district court correctly found that Continental articulated several legitimate reasons why Holt was fired. She was disruptive; there had been complaints by clients; she did not take direction from her supervisors.

These are all legitimate reasons for firing an employee. See *Graham v. Texasgulf, Inc.*, 662 F. Supp. 1451, 1462 (D. Conn. 1987), aff'd, 842 F.2d 1287 (2d Cir. 1988).

In order to prevail, plaintiff must show that these articulated reasons are pretextual. Plaintiff, however, has put forth no evidence to show that defendant's asserted reasons for the retaliation were pretextual. Since no

genuine issue of material fact remains, the district court correctly granted summary judgment on this issue and we affirm.

C. Discrimination in Pay and Benefits

Plaintiff's complaint also alleges that defendant discriminated against her on the basis of her sex and race in determining her salary and benefits in violation of § 1981 and Title VII. The district court determined that the § 1981 claim was barred by the statute of limitations applicable to such claims. The court further found that the sex-based pay discrimination claim was barred by the Equal Pay Act's statute of limitations. Accordingly, the court granted defendant's motion for summary judgment on the entire pay discrimination claim.

Since § 1981 does not have a statute of limitations, federal courts use the most analogous state statute of limitations in claims brought under § 1981. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987). In Connecticut, the applicable period is the three year statute of limitations in tort. Conn. Gen. Stat. Ann. § 52-577 (West 1991). Plaintiff attempts to invoke the Connecticut "savings" statute,[3] and Rule 15(c) of the

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[3] The statute provides that "[i]f any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of [various procedural problems] the plaintiff . . . may commence a new action . . . for the same cause at any time within one year

(continued...)

Federal Rules of Civil Procedure,[4] in order to extend the limitations period for her present claim. Plaintiff's argument fails because, inter alia, the savings statute only applies if the original claim was dismissed for procedural reasons and not on the merits. *Legassey v. Shulansky*, 28 Conn. App. 653, 659, 611 A.2d 930, 933-34 (1992). The district court dismissed the preliminary injunction motion because plaintiff failed to show irreparable injury; the court did not dismiss for procedural reasons. *Holt v. Continental Group, Inc.*, No. B-82 Civ. 119 (D. Conn. June 6, 1985). Since plaintiff filed the claim more than three years after she knew or should have known of the discrimination, the court correctly determined that the § 1981 claim was barred by the applicable statute of limitations. We affirm the dismissal of the § 1981 claim.

The court erred, however, in failing to consider plaintiff's claim that defendant discriminated against her in pay and benefits because of her race in violation of Title VII. Since Title VII and § 1981 provide distinct causes of action and different liability schemes, *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1316 (2d Cir. 1995), dismissal of the § 1981 claim did not fulfill the court's duty to

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[3](...continued)
after the determination of the original action or after the reversal of the judgment." Conn. Gen. Stat. Ann. § 52-592(a)(West 1991).

[4] Plaintiff's reliance on Rule 15(c) is misplaced because Rule 15(c) is limited to relation back of amended pleadings and her complaint is not an amended pleading.

consider plaintiff's claims brought pursuant to Title VII.[5]

The district court also erred in dismissing plaintiff's sex based pay discrimination claims on statute-of-limitations grounds. Although plaintiff sued for sex discrimination under Title VII, and never mentioned the Equal Pay Act, the district court found that the sex based pay discrimination claim was time barred because the claim could be construed as a claim under the Equal Pay Act, 29 U.S.C. § 206(d)(1)(1994). The court reasoned that such a construction would invoke the Equal Pay Act's two year statute of limitations. 29 U.S.C. § 255 (a)(1994). The district court explained that the standards of the Equal Pay Act apply in sex discrimination claims whether the suit is plead under Title VII or the Equal Pay Act, and thus determined that the Equal Pay Act's statute of limitations barred plaintiff's claim.

While it is true that Title VII and the Equal Pay Act are interrelated, the district court misunderstands the relationship between the two statutes. The Supreme Court has held that the Bennett Amendment to Title VII incorporates the enumerated affirmative defenses of the Equal Pay Act into Title VII in sex discrimination cases.

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[5] The Title VII claim was not time barred. Plaintiff could not file her Title VII claim until she received a right to sue letter from the EEOC. See Holt v. Continental Group, 708 F.2d 87, 89 n.1 (2d Cir. 1983).That occurred in May of 1986, just three months prior to the filing of this Title VII suit.

County of Washington v. Gunther, 452 U.S. 161, 170-171 (1981). The affirmative defenses discussed in Gunther are substantive in nature and are included in the text of the Equal Pay Act. See 29 U.S.C. § 206(d)(1)(providing exceptions to the requirement of equal pay for equal work if the inequality is due to a seniority system, a merit system, a system which measures earnings by production, or a differential based on a factor other than sex). In contrast, while it is true that the statute of limitations is an affirmative defense, it is procedural and it is not included in the text of the Equal Pay Act.

Title VII has its own statutorily prescribed time limitations. Title VII requires a claimant to file a charge of discrimination with the EEOC within 180 days of the alleged unlawful discrimination, or if the claimant initially filed a complaint with a state or local agency, within 300 days of the allegedly discriminatory conduct, or within thirty days of receiving notice that the state or local agency has terminated the proceedings, whichever is earlier. 42 U.S.C. § 2000e-5(e); *Gomes v. Avco Corp.*, 964 F.2d 1330, 1332 (2d Cir. 1992). Once a claimant has received a right to sue letter from the EEOC, suit must be filed within ninety days. 42 U.S.C. § 2000e-5(f)(1); *Cornwell v. Robinson, 23 F.3d 694*, 706 (2d Cir. 1994). Plaintiff's claims are timely under these rules since she made a timely complaint to the EEOC and then filed suit within ninety days of receiving her right to sue letter. We know of no precedent that indicates that the Equal Pay Act's statute of limitations applies to Title VII claims of sex-based pay discrimination. Thus we find that

the court erred when it failed to review the sex based pay discrimination claim under Title VII.

We now consider defendant's motion for summary judgment on the merits in order to determine whether the dismissal should be affirmed on other grounds, or whether the case must be remanded for further proceedings. As discussed above, we proceed under the *McDonnell Douglas* framework. Plaintiff must put forth a prima facie case; defendant must articulate a legitimate, non-discriminatory reason for its actions; then plaintiff must show that the proffered reason was pretextual and that more likely than not the true reason was discriminatory. See *Viola*, 42 F.3d at 715-17. In order to survive a motion for summary judgment, plaintiff must put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's sex or race was the real reason for the discharge. *See id.* at 717.

Plaintiff contends that defendant discriminated against her by paying her significantly less than other employees who were white and/or male. Defendant defends the salary differentials explaining that any difference in salary is due to a difference in experience. A review of the salaries and level of experience for each of the individuals in the Corporate Counsel II position supports defendants' explanation. The following chart reflects the prior experience and salary of members of the Corporate Legal Department in May of 1980.

Corporate Counsel II	Experience	Salary
Holt	Grad. law school in 1973; 1 yr. at small firm; 2 yrs. at Scott Paper Corp.	$45,000
Patricia Heck[6]	Grad. law school in 1972; Clerk for C.J. for the District of Rhode Island; 7 yrs. at Dewey Ballantine	$65,000
John Garrigan	Grad. law school in 1955; 19 yrs. exper -ience as General Counsel for Straton Group	$60,500
Lee Rettig	Grad. law school in 1961	$48,000
William Sisley	Grad. law school in 1969; 4 yrs. at SCM Corp.	$61,100

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[6] Heck was not hired until January of 1981. Her starting salary was $65,000. It should be noted that by 1981 Holt's salary had increased to $52,500 and by 1982 it had increased to $57,500.

John French	Grad. law school in 1958; Assoc. at Satterlee & Stephens; Assoc. at Milbank & Tweed	$56,175

With the exception of Heck, each of the individuals in the Corporate Counsel II position had been out of law school substantially longer than Holt, and their salaries were greater as a result. Although Heck had been out of law school only one year longer than Holt, she had clerked for the Chief Judge of the United States District Court for the District of Rhode Island and then spent seven years at a major New York law firm. Thus, defendant's explanation that any difference in salary was due to experience applies to Heck as well. The evidence indicates that any difference in salary among people employed in the Corporate Counsel II position is readily explained by a difference in experience.

Plaintiff makes an additional claim regarding the MIP bonus plan. Plaintiff contends that defendant discriminatorily refused to allow her to participate in the MIP bonus program. Specifically, she claims that defendant changed the program so that plaintiff would be unable to receive a bonus. In support of her claim, plaintiff explains that she was the first black person to have a C-2 salary grade, and that around the time that she attained C-2 status, defendant altered the program so that she would be ineligible for participation in the MIP bonus program. Plaintiff also notes that she was the first

person ever to hold the Corporate Counsel II position and not receive a MIP bonus.

Defendant denies that the change in policy was due to plaintiff's race or sex. Instead, defendant maintains that the MIP bonus program was discontinued for all C-2 grade attorneys in December of 1979 so that the company could increase the salaries for these same attorneys in order to allow defendant to better compete for legal talent. Under the revised policy, employees would only be eligible for participation in the MIP bonus program once they achieved a C-5 grade. Defendant claims that after this change in eligibility for MIP participation, "all attorneys hired by the Department at a grade level below C-5 were ineligible for participation in the MIP." Even though the program was eliminated, "any attorney in the Department who had previously been eligible for an MIP [remained] eligible without reference to his or her grade level." Thus, all previously participating attorneys in Continental's legal department were "grandfathered" into the MIP program. These "grandfathered" employees received both increased salaries and the MIP bonus.

Plaintiff's allegation gives us pause because one consequence of the elimination of the MIP program along with the grandfathering provision is a rather dramatic disparity between Holt's total compensation compared with all others in the Corporate Counsel II position. All of the Corporate Counsel II employees, with the exception of Heck who was hired after the elimination of the program, received substantial bonuses in addition to

the salaries reflected in the chart. A true comparison of compensation packages in May of 1980 reveals the following (experience other than year of law school graduation is not repeated):

Corporate Counsel II	Salary	Bonus	Total
Holt (73)	$45,000	0	$45,000
Patricia Heck ('72)	$65,000[7]	0	$65,000
John Garrigan ('55)	$55,000	$15,246	$70,246
Lee Rettig ('61)	$48,000	$10,445[8]	58,445
William Sisley ('69)	$61,000	$15,019	$76,019
John French ('58)	$56,175	$13,482	$69,657

Thus in 1980 Holt received over $13,000 less than the next lowest paid attorney and more than $30,000 less than the highest paid person on the chart.

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[7] Holt argues that as of January of 1981, the difference between her salary and Heck's reflects the amount Holt would receive if allowed to participate in the MIP bonus program. Although the percentage difference between the two salaries may be in the range of a large bonus, we have already explained that the difference in the salaries is readily explained by a difference in experience. If the bonus program were being implemented in a discriminatory fashion, we would expect to see Heck getting a bonus in addition to her salary.

[8] The record is inconsistent on the amount of Rettig's bonus. The record indicates that Rettig's bonus was $10,445; but it also indicates that her bonus was $9,792 which would make her total compensation $57,972.

A review of the status of each of these members of the Corporate Legal Department indicates, however, that the new policy was uniformly applied. Rettig, Garrigan, and French all received MIP bonuses in the Corporate Legal Department in 1978 and 1979, prior to the change, so they were grandfathered and continued to receive a bonus. Sisley came into the department in May of 1980 as both Corporate Counsel II and Corporate Secretary. He was eligible for the MIP bonus under the new policy because he had a C-5 salary grade. Holt and Heck were hired into the Department after the change and thus were not permitted to participate in the MIP program. That Heck, who is white, was not permitted to participate in the program bolsters defendant's assertion that the policy change was not racially motivated.

In an effort to show that defendant's decision was actually racially motivated, plaintiff attempts to rely on two internally generated corporate reports, the Braye Report and the Campbell Report.[9] The Braye Report involves a human resources departmental study regarding Continental's problem relative to retaining black employees. The report is based on a series of interviews with exempt black employees of Continental and states that "[i]t is believed that blacks are undergraded and underpaid." Plaintiff also mentions the Campbell report which reviewed Continental's potential exposure for Equal Pay violations. Continental seeks to minimize the

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[9] These reports were filed under seal with the district court as defendant's exhibits.

importance of these reports by explaining that they are imperfect, privileged, and irrelevant to Holt's claims.

We agree that the Campbell Report (which seeks legal advice) is protected by the attorney-client privilege. The admissibility of the Braye Report is not so clear. Defendant claims that it is protected by the so called "self-evaluative" privilege. However, defendant provides no authority for the existence of such a privilege in Connecticut, and we find none. Cf. *United States v. Dexter*, 132 F.R.D. 8 (D. Conn. 1990) (refusing to apply the self-evaluative privilege where federal law governs and the government sought to compel discovery). In any event, the Braye Report resulted from a study in 1978 designed to assist the corporation in retaining black employees. Its indication of a belief that at that time blacks were undergraded and underpaid has little or no probative value on the issue of the corporation's motivation in amending the MIP program at the end of 1979. Even if it were admissible, the Braye Report simply would not demonstrate that defendant's proffered non-discriminatory reason for modifying the MIP program was pretextual.

Holt has failed to put forth evidence to suggest that defendant's explanations for the difference in compensation is due to anything other than experience and the legitimate alteration of the MIP bonus plan. Since she has not identified any evidence which would demonstrate that defendant's proffered reasons are pretextual, we grant defendant's motion for summary judgment on the pay discrimination claims.

III. CONCLUSION

We find that the trial court properly granted defendant's motion for summary judgment on plaintiff's § 1981 claim because it was barred by the statute of limitations. In addition, because no genuine issues of material fact remain on either plaintiff's claim of discrimination in promotions and job tracking, or her retaliation claim, summary judgment was appropriate on those issues. The decision of the district court is affirmed as to each of these issues.

The district court erred in failing to review plaintiff's claim of discrimination in pay and benefits in violation of Title VII. Having reviewed the substance of defendant's motion for summary judgment, we determine that plaintiff has failed to put forth any evidence which would establish that defendant's proffered reasons are pretextual. Accordingly, defendant's motion for summary judgment is granted. The district court's dismissal of the pay discrimination claims is affirmed on these grounds.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At the stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of November one thousand nine hundred and ninety-six.

VERONICE A. HOLT,
Plaintiff-Appellant,

v. Dkt No: 95-7297

KMI-CONTINENTAL, INC.,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in *(sic)* banc having been filed herein by the appellant

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in *(sic)* has been transmitted to the judged for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERONICE A. HOLT	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
	:	B-86cv00389 (AVC)
KMI CONTINENTAL	:	
INCORPORATION	:	
f.k.a. The Continental	:	
Group, Inc.	:	

VERONICE A. HOLT	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
	:	3:93cv00619
KMI CONTINENTAL	:	
INCORPORATION	:	
f.k.a. The Continental	:	CIVIL ACTION NO.
Group, Inc.	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an employment discrimination action brought pursuant to 42 U.S.C § 1981 *et seq.*[1] and title VII of the

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[1]42 U.S.C. § 1981, provides in relevant part: (a) All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be

(continued...)

Civil Rights Act of 1964, as amended 42 U.S.C. & 2000e *et seq.*[2], in which the plaintiff's first complaint alleges that the defendant illegally discriminated against her, on the basis of her race and sex, while she was employed by the defendant. The plaintiff's second complaint alleges that the defendant retaliated against her because of the plaintiff's complaints regarding the defendant's various forms of discrimination, whereby the defendant ultimately terminated her. The plaintiff seeks, inter alia, compensatory and punitive damages.

On May 12, 1994, the defendant filed a motion for summary judgment. On May 19, 1994, the plaintiff filed her motion for summary judgment based upon the merits of each count, with respect to complaints I and II, in which she claimed that she was entitled to judgment as a matter of law.

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[1](...continued)
parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

[2] 42 U.S.C.§ 2000e-2, provides in relevant part: (a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin.

With respect to the first complaint, the issues are: (1) whether the defendant denied the plaintiff equal pay for equal work (Count One); (2) whether the defendant discriminatorily denied plaintiff her promotions (Count Two); (3) whether the defendant established it's jobs on the basis of race and sex (Count three): (4) whether the plaintiff's action represents a class action suit (Count Four). With respect to the second complaint, the sole issue is whether the defendant retaliated against her throughout her employment and through her discharge with the defendant (Count II). This ruling disposes of both motions.

The court concludes that the plaintiff's 1981 claims are time barred and her Title VII claims lack sufficient evidence to support any claim of discriminatory conduct by the defendant. Further, the plaintiff's class action claim, (Count 4), is denied as moot. Accordingly, the defendant's motion for summary judgment is granted. The plaintiff's motion for summary judgment is denied.

FACTS

Examination of the complaint, affidavits, and other supporting materials discloses the following undisputed facts. The plaintiff, Veronice A. Holt is a black female. On October 18, 1976, the defendant, The Continental Group, Inc.,[3] hired the plaintiff as an in-

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[3] In 1981-82, The Continental Group, Inc. merged with KMI Continental. The Continental Group is (continued...)

house attorney to work as assistant group counsel of Continental Forest Industries, (CFI). CFI is a subsidiary product company of defendant engaged in the manufacture, sale and distribution of forest products. The defendant paid the plaintiff a starting salary of $26,000, a salary consistent with her three years of experience and a salary higher than the plaintiff had earned with her previous employer.

In June, 1978, CFI hired Gerald Rubin, as assistant general counsel, the same title held by the plaintiff. Rubin, who had graduated from law school in 1968, five years before the plaintiff, had received a Masters of Law degree and clerked for the Ohio Court of Appeals for two years. In addition, Rubin was attorney for the United States Department of Justice, Antitrust Division, for eight years before joining the defendant corporation's employ. The defendant gave Rubin a starting salary of $40,000. By then, the plaintiff's salary had increased to $31,900.

In April, 1979, eight months after her last salary increase, the defendant awarded the plaintiff another salary increase to $35,000 and also raised her job two full grades. As a result, the plaintiff was just two grades below Rubin.

In October, 1979, the plaintiff, apparently still unhappy with her salary, made a formal request to her

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[3](...continued)
now a wholly-owned subsidiary of KMI Continental Inc.

supervisor, Ecton Manning, that her salary be reviewed and equalized with Rubin's salary. In an effort to accommodate the plaintiff, Manning proposed a plan to provide the plaintiff with incremental increases so that her salary would be equalized with Rubbing's salary by July, 1981. The plaintiff, however, rejected Manning's salary equalization plan and then met with Ronald Mario, vice president of administration and human resources. Mario denied the plainiff's request for immediate equalization. The plaintiff then informed Manning of her intention to file discrimination charges against the defendant.

On November, 15, 1979 the plaintiff met with Jess Belser, the president of CFI. In that meeting, Belser proposed three alternatives: (1) the plaintiff could file her suit; (2) the plaintiff could submit the matter to binding arbitration; 0r (3) the plaintiff could state what she thought was an appropriate increase and her salary could be raised. On November 30, 1979, the plaintiff met with Belser, with respect to her salary request, and received a 20% increase in her pay. The $7,000 increase in pay, combined with her salary increase just eight months prior, increased the plaintiff's annual salary to $42,000. The plaintiff later acknowledged in her desposition that her salary increased thereafter at a greater rate than Rubin's salary.

In February, 1980, the defendant promoted John Conway, the associate general counsel of CFI, to it's corporate legal department. The plaintiff, as a result, sought Conway's old position as associate general

counsel, a higher position then(sic) she currently held at CFI. However, Manning, the plaintiff's supervisor, informed the plaintiff that he was not yet ready to fill that position.

Shortly after Conway's promotion, Stephen Bermas, associate general counsel and second-in-command at the corporate legal department and Catherine Rein, vice president and general counsel of the defendant, asked the plaintiff to accept a position at the corporate legal department. Both Bermas and Rein felt that the move would provide the plaintiff with a broader career path and would solve any personality conflicts that may have arisen between Manning and the plaintiff. The plaintiff accepted the promotion and was given a $3,000 increase in pay resulting in an annual salary of $45,000.

In April, 1980, the plaintiff joined the corporate legal department where the defendant assigned her to work with John French, the assistant general counsel-corporate. Within a few months after the plaintiff joined the corporate legal department, the plaintiff began to complain to Bermas and Rein that she not getting responsibility and client contact.

In September, 1980, Bermas told Rein that the plaintiff was angry and upset about her salary and believed that her job was less responsible than had been represented to her. In that same month the plaintiff also stated that if French were to leave, then she should get his position as assistant general counsel-corporate. In response, Rein told the plaintiff that she was sympathetic

to the plaintiff's need for greater challenge and responsibility and that she would try to accommodate the plaintiff as much as possible. Rein also told the plaintiff that if French were to leave, the plaintiff would not be a candidate for the job because she lacked the requisite experience necessary for that position.

A short time thereafter, Rein told the plaintiff that she would be the top candidate for any job for which she was qualified, but because of her lack of experience, she was not currently qualified for any "management" position. Rein also told the plaintiff that she should not make unrealistic demands based on unreasonable expectations about the rate of her progress. The plaintiff responded by demanding a response within two weeks with respect to what the defendant intended to do in response to her complaints.

Bermas and Rein later identified two opportunities that they believed met the defendant's needs and the plaintiff's demands. One position was the position of "Associate General Counsel" or second- in-command , at one of the defendant's product companies where both Bermas and Rein had served prior to their promotions to the corporate legal department. The plaintiff, however, refused this position because she considered it a "lateral demotion."

The alternative position offered to the plaintiff was that of "Securities Counsel[,]" which provided the plaintiff with a similar opportunity for advancement. Because of the corporate legal department's expanding

area of securities, finance, mergers, and acquisitions, the defendant created a position for the plaintiff where she could eventually assume responsibility for the securities and finance aspects of the French's position.

Although the plaintiff initially complained that she wanted neither position offered and insisted on French's position, she eventually chose the Securities Counsel position. In November, of 1980, the plaintiff became Securities Counsel and received a salary increase to $7,250, bringing her annual salary to 52,250.

In February, 1981, French left the Continental Group. When he left, he had twenty years of legal experience, 12 years at two major law firms with in-depth experience in securities and financing and eight years working for the defendant in securities and financing and eight years of working with the defendant in securities, finance, mergers and acquisitions. The plaintiff, on the other hand had only been Securities Counsel for four months and was still relatively new to those substantive areas of law. Rein, therefore, decided to parcel out French's functions. Rein also thought that the plaintiff should remain as Securities Counsel with the hope that she would eventually develop the sufficient work expertise and skill to do all of the securities and finance work. Bermas and Rein hoped that the plaintiff would merit promotion to the position of Assistant General Counsel within a few years, and Rein personally indicated this to the plaintiff.

On October 22, 1981, while still employed by the defendant, the plaintiff filed charges of race and sex

discrimination with the Connecticut Commission on Human Rights and Opportunities (CCHRO). The plaintiff alleged that the defendant had unlawfully denied her equality in promotions, and pay and other terms and conditions of employment.

Once settled in her position as Securities Counsel, the plaintiff's conduct grew more divisive and demanding. On or about November 19, 1981, Rein learned that certain organizational changes were being considered which would result in a reduction in workforce. Although Rein had previously authorized hiring a new attorney to assist the plaintiff for the first few months of 1982, to help with the substantial amount of projects due, the "freeze" on hiring required that the search be suspended. After the defendant notified the plaintiff of this "freeze[,]" the plaintiff wrote in a memorandum to Bermas stating that she knew of no business changes that would justify a decision not to hire a new lawyer to assist her. Bermas wrote back to remind the plaintiff that this topic was sensitive and should be held in strict confidence. Bermas further went on to say that any future communications should be made in person, rather than memo. The plaintiff, however, wrote back the same day.

On December 8, 1981, the plaintiff met with Bermas to discuss her performance review. Bermas' review reflected Rein's and Bermas' observations of the plaintiff's work and comments of her work, both good and bad, from the plaintiff's clients. This review also reflected the plaintiff's conflict with other attorneys in the department.

Bermas rated the plaintiff's overall performance as "fully satisfactory." The plaintiff received an increase in salary retroactive to November 1, 1981. The plaintiff's salary was increased to $57,500. During the five years that the plaintiff was employed by the defendant, her salary had increased by 119% .[4]

Bermas evaluated four attorneys in 1981: two were rated "fully satisfactory" and two were rated "superior." None were rated "outstanding." On January 8, 1982, the plaintiff sent Rein a 15-page draft of her written response to her performance review.

On January 8, 1981, Bermas received a complaint from William Sisley, a colleague in the department, alleging that the plaintiff forced another lawyer in the department to relinquish the only word-processor available for her personal use, even though the lawyer was using the machine for a work-related deadline. Bermas later told the plaintiff that her disrupting the operations of the department and interfering with the department's ability to meet its professional responsibilities was a very serious matter. Bermas also warned her that such unprofessional behavior could not be tolerated.

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[4] Although the defendant['s] state that the plaintiff's salary actually increased 120%, the court does not find this to be a material dispute.

In January, 1982, Richard Lewis, the General Manager of Tax Planing and Analysis, reported to Bermas that he had an "upsetting encounter" with the plaintiff. According to Lewis, the plaintiff had accused him and another executive "hiding" from the chairman of CGI certain alleged costs in a restructuring project. The plaintiff had only minor involvement with the project, which had been underway for several months and [was] close to completion. Lewis had already resolved the issues to which the plaintiff was alluding, and told her so. Nevertheless, he went back and reviewed them again. Lewis reported to Bermas that the plaintiff's charges were completely mistaken.

On the evening of January 14, 1982, Bermas received a telephone call from Phillip Silver, Executive Vice President and Chief Financial Officer of GCI. Silver informed Bermas that he was concerned about the plaintiff's behavior and was uneasy about having her involved in any aspects of work within his area of responsibility.

On Friday, January 15, 1982, Bermas received a telephone call from the outside counsel who had been retained by Rein to represent CGI with respect to a highly confidential acquisition. Outside counsel told Bermas that the plaintiff directed his firm to discontinue any further due diligence investigation because it was her responsibility. Also on that day, an attorney at a second law firm called Bermas to advise him that the plaintiff wanted his firm to do the due diligence investigation. That same day, Rein and Bermas went to the plaintiff's

office to discuss her unilateral reversal of Rein's instruction to outside counsel. The plaintiff stated that she was in charge of all securities matters and that this project was a securities matter. Bermas and Rein informed her that she was incorrect, and that this project, in fact, was not a securities matter.

Based on these events, Rein and Bermas concluded that they could no longer tolerate the plaintiff's disruptive behavior because it prevented them from accomplishing their own responsibilities. On January 20, 1982, after the plaintiff did not appear for work for two days for personal reasons, Bermas wrote a letter to the plaintiff informing her that her employment was terminated, Subsequently, Patricia Heck, a female attorney with over nine years of experience, assumed the position of Assistant General Counsel, the position originally reserved for the plaintiff.

On February 16, 1982, the plaintiff filed a complaint in the federal district court seeking a preliminary injunction to compel Continental to reinstate her as Securities Counsel, the last position she held prior to her termination. On April 15, 1982 , the court ruled in favor of the defendant holding that the plaintiff failed to show either the "likelihood of success or irreparable harm," necessary to justify a preliminary injunction. ***Holt v. Continental Group, Inc.***, 542 F. Supp. 16 17 (D.Conn 1985 [*sic*]).

The plaintiff appealed the decision to the Second Circuit Court. On May 24, 1983, the court reversed and

remanded for consideration by the district court the factual question of whether the circumstances of the plaintiff's discharge either deterred other Continental employees from asserting their own claims of discrimination or deterred potential witnesses for the plaintiff from testifying on her behalf. *Holt v. Continental, Inc.*, 708 F.2d, 87 90-91 (2d. Cir. 198).

The defendant petitioned the United States Supreme Court for a writ of *certiorari* seeking review of whether an individual had standing to obtain an injunction against "chilling" on behalf of the government and other employees. The plaintiff filed a cross petition on the basis that the Second Circuit should have ordered her reinstatement. Both parties were denied. *See* 465 U.S. 1038 (1984) 465 U.S. 1030 (1984).

On remand to the district court, the court held a hearing to determine whether there was a "chilling effect". The plaintiff amended her complaint to assert claims against the Governor of Connecticut and the CCHRO. On June 6, 1985, the court rendered judgment for the government. *Holt v Continental Group* 631 F. Supp 653 (D.Conn. 1985). On the same day, the court also rendered a final judgment denying the preliminary injunction and dismissing the compliant. *Holt v. Continental Group, Inc.*, No 82-119, slip op. (D. Conn. June 6. 1985).

The plaintiff's request for reconsideration was denied, she then appealed to the Second Circuit. On January 30, 1986, the Second Circuit affirmed the court's ruling and

the plaintiff sought a writ of certiorari from the United States Supreme Court which was again denied. See 788 F.2d 3 (2d Cir. 1986), *cert. denied*, 479 U.S. 839 (1986).

On June 13, 1985, the CCHRO concluded its investigation of the plaintiff's first complaint and dismissed the plaintiff's action for lack of sufficient evidence. On February 27, 1986, the CCHRO dismissed the plaintiff's second complaint, alleging retaliation, also for lack of sufficient evidence. The plaintiff then requested that the EEOC review and reinvestigate the CCHRO finding. On August 6, 1986 the EEOC issued a "no cause" finding as to the plaintiff's first complaint. On April 5, 1993, the EEOC affirmed the "no cause" finding[s] of the CCHRO, with respect to the plaintiff's second complaint, and issued the plaintiff a right to sue letter.

On August 8, 1986, the plaintiff filed her first compliant against the defendant alleging, *inter alia*, race and sex discrimination. Subsequently, on March 25, 1993, the plaintiff filed her second complaint alleging that the defendant retaliated against her because of her complaints regarding the defendant's various forms of discrimination. Both the plaintiff and the defendant in due course, filed various filed motions for summary judgment. Both the plaintiff and the defendant in due course, filed motions for summary judgment.

STANDARD

Summary judgment is appropriately granted when the evidentiary record shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C). In determining whether the record presents genuine issues for trial, the court must view all inferences and ambiguities in a light most favorable to the non-moving party. See *Bryant v Maffuci*, 923 F. 2d. 979, 982 (2d Cir.), *cert. denied*, U.S. , 112 S. Ct. 152 (1991). A plaintiff raises a genuine issue of material fact if "the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 252 (1986). Rule 56 (c) "provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Liberty Lobby*, 477 U.S. at 247-48 (emphasis in original). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. . . [and] it should be interpreted in a way that allows it to accomplish this purpose. *Celotex v. Catrett*, 477 U.S. 317 323-24 (1986).

If the moving party initially shows the court that there is an absence of a question of fact, the non-moving party has the burden of establishing that a genuine issue as to any material fact actually does exist. *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A fact is material only if it might affect the

outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986).

DISCUSSION

Equal pay for equal work (Count One)

The defendant first argues that count one of the plaintiff's first complaint, alleging that the defendant discriminated against the plaintiff on the basis of her sex and race in determining her salary and benefits is time-barred. With respect to the plaintiff's allegation of sex discrimination, the defendant contends that this part of count one could be construed as a claim under the Equal Pay Act. Where a claim is for unequal pay for equal work based upon sex discrimination, the standards of the Equal Pay Act apply whether or not the suit alleges a violation of the Equal Pay Act or of Title VII. *McKee v. Bi-State Development Agency*, 801 F. 1014, 1019 (8th Cir. 1986). The defendant further argues that since the plaintiff's sexual discrimination claim falls under the Equal Pay Act, the claim is time barred under 29 U.S.C. 255. The court agrees. The applicable statute of limitations is 2 years and, therefore the plaintiff had 2 years to bring suit. Because the defendant terminated the plaintiff in January of 1982, and the plaintiff waited over four years to file her complaint in August of 1986, the court concludes the plaintiff's claim under the Equal Pay Act is time-barred under the two year statute of limitations.

The defendant contends that the plaintiff's § 1981 claim, with respect to race discrimination, is also time

barred. The Supreme Court has held the Federal courts should apply the "most appropriate or analogous state statute of limitations" to claims brought under 1981. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987) Following this mandate, the District Court of Connecticut has consistently applied Connecticut's three-year tort limitation period. *Shane v. Connecticut*, 82 F Supp. 829, 833 (D.Conn. 1993); *Napoleon v. Xerox Corp.* 671 F. Supp. 908, 910 (D. Conn. 1987).

This three-year statute of limitation[s] period begins to run on the date the plaintiff knew or should have known she was being discriminated against.[5] *Tadros v. Coleman*, 898 F.2d 10, 12, (2d Cir. 1990) *cert denied* 498 U.S. 869. The defendant, therefore, argues that the plaintiff's limitation period begins on the date of her allegedly discriminatory discharge. *Laffey v. Northwest Airlines, Inc.* 567 F.2d 429, 435 (D.C. Cir. 1976), (ending employment relationship terminates any existing discrimination and triggers running of limitations period) *cert denied*, 434 U.S 1086 (1978).

The plaintiff['s] claims, inter alia, that the Connecticut "savings" statute, Conn. Gen. Stat. 52-592 (1993),[6] should permit her first complaint, which was

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[5] Unlike claims brought under Title VII, the statute of limitations for 1981 claims is not tolled by filing a charge with the EEOC.

[6] Section 52-592 extends a statute of limitations (continued...)

filed after the statute of limitations had expired on her 1981 claims, to relate back to a complaint she filed against the defendant, in 1982, seeking a preliminary injunction.

In response, the defendant argues that the statute does not provide a second chance when a claim was dismissed on the merits.[7]

> "This statute, by its plain language, is designed to prevent a miscarriage of justice if the plaintiff fails to get a proper day in court due to the various enumerated procedural problems. It is not a device for avoiding our well-settled rules of res judicata."

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[6](...continued)
by one year for "any action, commenced within the time limited by law, [which] has failed on [one] or more times to be tried on the merits. . . for any matter of form."

[7] The plaintiff's prior claim against the defendant was a motion for a preliminary injunction seeking the plaintiff's reinstatement at Continental, which was finally dismissed after appeal to the Second Circuit and remand, on June 6, 1985. Holt v. ContinentalGroup, Inc., No. B-82-119, slip op. at 14. (D.Conn. June 6, 1985). The court dismissed the plaintiff's motion because the plaintiff had failed to show irreparable injury, "an absolute requirement for a preliminary injunction," and dismissed the plaintiff's complaint in its entirety because the injunction was the only relief sought in the complaint.

Legassey v. Shulansky, 28 Conn. App. 653, 658, 611 A.2d 930, 933 (1992) (granting summary judgment for defendant on grounds that 52-592 did not apply to plaintiff's second attempt to quash subpoena as first attempt had been dismissed on merits). The court agrees with the defendant and concludes that Connecticut's savings statute does not apply here because the plaintiff's prior complaint for injunctive relief was dismissed on the merits.

Accordingly, the three year statute of limitations applies and the plaintiff had until January 19, 1985 to file her 1981 claim. Because the plaintiff did not file this claim until August 8, 1986, the court grants the defendant's motion for summary judgment with respect to count one.

Discriminatory denial of promotions (Count Two)

The defendant next argues that the plaintiff failed to present any evidence which demonstrates that a material fact exists concerning her allegations that Continental intentionally discriminated against her by failing to promote her to the positions she believed she was entitled to hold. The defendant asserts that of the three positions for which the plaintiff applied, one position was left vacant, one position was filled by an attorney with ten years experience, and the last positions was filled by a female attorney with nine years experience. The defendant argues that its decisions to hire and promote were based on years of experience and relevant expertise, both of which are non-discriminatory business reasons.

The defendant claims that the plaintiff's experience, which included six years of relevant work, was simply insufficient to fill the aforementioned positions.

"A desire to hire the more experienced or better qualified applicant for a position is a recognized non-discriminatory, legitimate, and common sense reason upon which to base a hiring decision." *Downey v. Isaac*, 622 F. Supp. 1125, 1132 (D. D.C. 1985)*aff'd* , (D.C. Cir. 1986) 794 F2d 753. A defendant employer can prevail on a Title VII claim where it can show persuasive evidence that the plaintiff was less qualified by training and experience. Id., see also *Williams v. McCausland,* 782 F. Supp. 272 (S.D.N.Y 1992) (dismissing complaint where plaintiff failed to rebut employer's proffered reason for selection of white employee -- that said employee had greater experience, education, and a better performance record).

The plaintiff argues, however, that she should have received the promotion because she was "unquestionably the most qualified candidate." Plaintiff's memorandum at 12.

In *St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct 2742 (1993), the Supreme Court clarified the burden a plaintiff must carry to prevail on a discrimination claim. Under the *Hicks* Standard, the plaintiff must first prove a *prima facie* case.[8] For purposes of this motion, the

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[8] To present a prima facie case, the plaintiff (continued...)

defendant concedes that the plaintiff has established her prima facie case. The defendant then must articulate a legitimate, non-discriminatory reason for making the employment decision. *Hicks*, 113 S.Ct. 2742 (1993). Here, the defendant argues that one of the positions still remained open and the other two positions were filled by candidates with significantly more expertise in the requisite area of law.

The burden now shifts back to the plaintiff where she must prove that the defendant's articulated reason was false and that the real reason was illegal discrimination. *Id.*

The defendant contends that mere conclusory statements by the plaintiff that she was as qualified as her coworkers are insufficient to overcome the "pretext plus" hurdle. *Zimmitti v. Aetna Life Ins. Co.*, No. 2:92CV187 (AVC), slip op. at 11 ("plaintiff[']s subjective

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[8](...continued)
must prove the following:

(i) she belongs to a protected class;
(ii) she applied and was qualified for a job which the defendant was seeking applicants;
(iii) that, despite her qualifications, she was rejected; and
(iv) that after her rejection, the position remained open and the defendant continued to seek applicants with her qualifications.

McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802 (1973).

judgments of [her] superior qualifications are not sufficient to provide a basis to deny summary judgment"). An example of the plaintiff's overstatement of her qualifications is evidenced when she was asked about Rubin:

> Q: Did you feel Mr. Rubin had more antitrust experience than you?" [Rubin had eight years at the U.S. Attorney's Office, Antitrust Division.]
>
> A: "Not when it really came down to it." Holt Dep. at 97, Ex.A.

In cases involving an employee's qualifications for a specific position or salary level, "the court cannot second guess the wisdom of the defendant's business decision, as long as it was nondiscriminatory." *Zimmitti*, No. 2:92CV187 (AVC), slip op. at 12. "The mere existence between two applicants, one black [female] and one white [male], alone does not raise an inference of racial discrimination" when the white applicant is hired. *Pierce v. Marsh*, 859 F.2d 601, 604 (8th Cir. 1988). Because the plaintiff has failed to present any evidence to establish that the defendant's articulated reason for denying the plaintiff certain promotions was false and that illegal discrimination was the real reason, the court grants the defendant's motion for summary judgment with respect to count two.

Establishment of jobs on the basis of race and sex (Count three)

The plaintiff alleges that "at all times" the defendant maintained a "policy and practice of hiring and promoting in its legal department based on race and sex." The defendant denies those allegations and maintains that it never had such a discriminatory policy.

As a basis for her claim, the plaintiff asserts that the "only candidates of the same race or sex as the prior incumbent" were interviewed on four occasions. The defendant responds that its decision to hire white males, white females, black females, black males, and black females is not indicative of any illegal discrimination but rather, a good business practice to find the best qualified candidate for the job. The defendant further cites that the plaintiff's acknowledgment that Continental interviewed and selected blacks and women for positions in the legal department in an argument directly contrary to her claims of discrimination. The court agrees. The court, therefore, grants the defendant's motion for summary judgment with respect to count three.

Class Action (Count Four)

Because the plaintiff acknowledges that her class action claim is "moot," the court grants the defendant's motion for summary judgment with respect to count four.

Retaliation (Complaint II)

In April, 1993, the plaintiff filed a one count claim of retaliation against the defendant, pursuant to Title VII and 1981. The defendant argues that the 1981 claims are timebarred, as discussed in count one of the first complaint. Because the court has already determined that the plaintiff's 1981 claims are timed-barred, the court will only address the Title VII claims in the plaintiff's second complaint.

To establish that an employer has unlawfully retaliated for an employee's having pursued a discrimination action, the employee must show that he was engaged in protected activity know[n] to the employer; and that there occurred an employment action adverse to the employee; and that there existed a causal connection between the protected activity and the adverse employment action. *Hollander v. American Cyanamid Co.*, 895 F. 2d 80, 85 (2d Cir. 1990) (granting summary judgment for employer where employee failed to establish causal nexus between negative reference and filing of discrimination charge). After the employer proffers a legitimate nondiscriminatory reason the plaintiff must prove that both the defendant's reasons were false and that discrimination was the real reason. *Hicks,* 113 S.Ct. at 2752. In an employment discrimination case, "[s]ummary judgment is approrpiate where critical evidence is so weak or tenuous on an essential fact it could not support a judgment in favor of the nonmovant." *Armstrong v. City of Dallas,* 997 F.2d 62, 67(5th Cir. 1993).

The defendant claims it's reason for terminating the plaintiff were, inter alia, her attempt to subvert the authority of her supervisors by firing outside counsel and retaining her own outside counsel, the refusal of defendant's client's to continue to work with her, and her accelerating disruptive behavior in the department. On January, 1982, the defendant refers to a specific example of the plaintiff's disruptive behavior in which she usurped the only word processor in the department for her personal use at a time when another attorney was using it to meet a deadline for the defendant's business. When Bermas, her supervisor, warned her that her unprofessional behavior would not be tolerated, the plaintiff responded that would "not listen to any more of this garbage" and stormed out of her supervisor's office.

The way in which an employee expresses her opposition to her employer "must be reasonable, as determined on a case by case basis, by balancing the purpose of Title VII,. . . against an employer's legitimate demands for loyalty, cooperativeness and a generally productive work environment." *Graham v. Texasgulf,* Inc., 622 F. Supp. 1451, 1462, (D.Conn.) 1987), aff'd 842 F.2d 1287 (2d. Cir. 1988), quoting *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403, 412 (S.D.N.Y. 1975).

The plaintiff argues that on at least two occasions, Rein, her supervisor, told the plaintiff that "she would suffer severe consequences if she filed charges of employment discrimination." Specifically, the plaintiff refers to Rein's statements that "she [plaintiff] would have to be crazy to file a discrimination suit . . . and she

[Rein] specifically referred to a friend of hers from Celanese, who filed a suit, and how it had been five years before she [her friend] had found another job." On the second occasion, the plaintiff claims that Rein repeated what she had previously stated, with respect to her friend from Celanese.

The defendant vigorously denies that Rein threatened the plaintiff in any way. The defendant argues that these comments were meant to offer practical advice to the plaintiff, as evidenced by the fact that after the conversation, Rein continued to authorize promotions and salary increases for the plaintiff. However, for purposes of this summary judgement motion, the defendant will assume the comments were made as the plaintiff alleges.

The defendant responses that, assuming arguendo, that the plaintiff believed these remarks were "threats" intended to retaliate against her, the plaintiff cannot show any nexus between these remarks and any adverse employment decisions.

After the second remarks were made, the defendant states that Rein offered the plaintiff a position as Securities Counsel so that she [plaintiff] could get the experience that Rein felt she needed to move into French's position of Associate General Counsel. The defendnt asserts further that Rein also gave the plaintiff a $7,250 raise in salary and decided to leave French's position open, even though it required the use of more outside counsel services again, in order to provide the

plaintiff with a career path. The defendant contends that these are not 'adverse employment decisions'. The Court agrees.

The plaintiff also argues, *inter alia,* that the defendant "retaliated against her by reassigning her job functions after it learned that she [plaintiff] had filed a charge of employment discrimination." The defendant responds that there is absolutely no evidence to support the plaintiff's claim that the offer to reassign work to outside counsel was intended to penalize her; instead, it was a good faith attempt to respond to her own complaints about her workload. The defendant argues that it is absurd for the plaintiff to characterize as 'retaliatory' the attempt of a responsible supervisor to transfer work away from an employee who has repeatedly complained that she had too much to do.

Although Title VII provides protection to those exercising their rights, it does not 'cloth the complainant with immunity for past and present inadequacies, unsatisfactory performance and uncivil conducts in dealing with subordinates and with [her] peers." *Mesnick v. General Elec. Co.,* 950 F.2d 816, 828-29 (quoting*Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8 Cir. 1988), *cert denied,* 488 U.S. (1988). The court, therefore, concludes that the plaintiff did not establish evidence that the defendant's articulated reasons were pretext and that illegal retaliatory discrimination was the real reason for her termination. Accordingly, with respect to the second complaint, the court grants the defendants motion for summary judgment.

The court concludes that the plaintiff has failed to establish that the defendant discriminated against her. Therefore, the plaintiff's motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment (document no. 158) is granted and the plaintiff's motion for summary judgment (document no.163) is denied.

SO ORDERED this the 16th day of February, 1995, at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Court Judge

Supreme Court, U.S.
FILED
APR 14 1997
OFFICE OF THE CLERK

(2)

No. 96-1260

In The

Supreme Court of the United States

October Term, 1996

VERONICE A. HOLT,

Petitioner,

vs.

KMI-CONTINENTAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The following parents, affiliates or subsidiaries of respondent KMI Continental, Inc., f.k.a. The Continental Group, Inc. have issued shares of stock to the public:

- California Energy Company, Inc.
- C-TEC Corporation

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STATEMENT OF THE CASE

In this suit, Petitioner Veronice Holt, who enjoyed salary increases of 120% during her six-year tenure as a lawyer for Respondent, KMI-Continental, Inc., (hereinafter "Respondent") claims that she should have survived a motion for summary judgment despite having adduced no probative evidence that discrimination played any role in her salary and promotional history or subsequent termination. Petitioner believes that after more than 15 years of litigation, including three appeals to the Second Circuit, and two prior petitions to this Court — all of which have been unsuccessful — that she is right and everyone else is wrong.

Petitioner's principal contention is that she produced enough evidence to survive summary judgment; she did not. The District Court entered judgment, the Second Circuit affirmed and Holt filed this petition. There was no mistake below and no conflict in the circuits — nothing that merits the attention of this Court. Petitioner had to produce affirmative evidence of discrimination. She can not overcome summary judgment merely by saying the employer was wrong. Here, Petitioner provided little else. The Court of Appeals properly upheld the entry of summary judgment where it determined that no evidence of pretext had been proffered. *See* Pet. App. at 26. Moreover, nothing in its decision conflicts with this Court's rulings or that of any other circuit. Petitioner tries to make the Second Circuit out to be the lone rebel in a supposed refusal to accept the holding of *St. Mary's Honor Ctr. v. Hicks*; that is not the case. The Second Circuit has consistently and correctly applied *Hicks*. Even if this Court were to decide that the Second Circuit needed guidance on *Hicks*, this is not the case to provide such guidance. The Second Circuit never reached the *Hicks* analysis because it never had to. The Court found that Petitioner offered no evidence of pretext mandating trial. *See* Pet. App. at 26.

Petitioner's second contention is that both the District Court and the Court of Appeals erred when they found Petitioner's § 1981 claims time-barred. The courts below correctly determined that the state tolling statute, specifically the Connecticut "savings" statute, did not apply to Petitioner's complaint. Petitioner's § 1981 claims were properly dismissed.

NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

Despite her successful career with Respondent, on October 22, 1981, while still employed, Petitioner filed charges of race and sex discrimination with the Connecticut Commission on Human Rights and Opportunities ("CCHRO") alleging that Respondent had unlawfully denied her equality in promotions, pay, and other terms and conditions of employment. Less than two months later, while still employed at Respondent, Petitioner filed another charge with the CCHRO alleging that Respondent gave her a negative performance review (which rated her as "fully satisfactory,") and failed to adhere to a job description (which she had drafted) in retaliation for the earlier filed CCHRO action. Petitioner began to exhibit intolerably disruptive behavior and was orally warned and then terminated effective January 22, 1982. On February 3, 1982, Petitioner amended her last CCHRO charge, to include a claim of retaliatory discharge.

Preliminary Injunction

On February 16, 1982, approximately one month after her termination, Petitioner filed a complaint in Federal District Court, seeking a preliminary injunction to compel Respondent to reinstate her as Securities Counsel, the last position she held prior to her termination. Judge Robert Zampano heard the matter and, on April 15, 1982, ruled in favor of Respondent. *Holt v.*

KMI-Continental-KMI Group Inc., 542 F. Supp. 16, 17 (D. Conn. 1985).

Appeal To The Second Circuit

Petitioner appealed Judge Zampano's decision to the Second Circuit. On May 24, 1983, the Court reversed and remanded on the question of whether the circumstances of Petitioner's discharge either deterred other Respondent employees from asserting their own claims of discrimination or deterred potential witnesses for Petitioner from testifying on her behalf. *Holt v. KMI-Continental Group Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983).

Petition For Writ Of Certiorari

Petitioner then petitioned this Court for a writ of *certiorari* on the basis that the Second Circuit should have ordered her reinstatement. Respondent also sought review of whether an individual had standing to obtain an injunction against "chilling" on behalf of the government and other employees. Both petitions were denied. *Holt v. KMI-Continental Group Inc.*, 708 F.2d 87 (2d Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984).

Remand To The District Court

On remand to the District Court, the case was transferred to Judge Ellen Bree Burns who heard testimony to determine whether there was a "chilling effect." Petitioner amended her Complaint to assert claims against the Governor of Connecticut and the CCHRO. Judgment for the government was entered on June 6, 1985. *Holt v. KMI-Continental Inc.*, 631 F. Supp. 653 (D. Conn. 1985), *aff'd*, 788 F.2d 3 (2d Cir.), *cert. denied*, 479 U.S. 839 (1986). On the same day, Judge Burns also entered a final judgment denying the preliminary injunction and dismissing the complaint. *Holt v. KMI-Continental Group Inc.*, No. 82-119 (D. Conn. June 6, 1985).

Appeal To The Second Circuit: Writ Of Certiorari

Petitioner filed a request for reconsideration which was denied and then appealed again to the Second Circuit. On January 30, 1986, the Second Circuit affirmed Judge Burns' ruling and Petitioner sought a writ of *certiorari* from this Court which was again denied. *Holt v. KMI-Continental Group, Inc.*, 788 F.2d 3 (2d Cir. 1986), *aff'd*, 631 F. Supp 653 (1985), *cert. denied*, 479 U.S. 839 (1986).

Dismissal Of The CCHRO Complaints

On June 13, 1985, the CCHRO dismissed Petitioner's first action for lack of sufficient evidence. Petitioner requested that the Equal Employment Opportunity Commission ("EEOC") review and reinvestigate the CCHRO findings and, on August 6, 1986, the EEOC issued a "no cause" finding. On February 27, 1986, the CCHRO dismissed Petitioner's second complaint for lack of sufficient evidence and Petitioner requested that the EEOC reinvestigate the findings of the CCHRO on March 30, 1986. On February 24, 1993, the EEOC affirmed the "no-cause" finding.

Summary Judgment Enters On The District Court Complaint

On August 8, 1986, Petitioner filed a 196 paragraph, four count complaint in the United States District Court, District of Connecticut. On April 5, 1993, the Petitioner filed a 177 paragraph, one count complaint alleging retaliation in pay and promotion and retaliatory discharge in the United States District Court, District of Connecticut. The United States District Court granted Respondent's motion to consolidate Petitioner's two complaints on September 14, 1993. On February 16, 1995, the District Court granted summary judgment to Respondent as to all counts of the consolidated complaint.

Appeal To The Second Circuit: Writ Of Certiorari

Petitioner appealed to the Second Circuit, which upheld the District Court ruling on September 4, 1996. *Holt v. KMI Continental Inc.*, 95 F.3d 123 (2d Cir. 1996). After her request for rehearing containing a suggestion for rehearing *en banc* was denied, Petitioner filed for a writ of *certiorari.*

STATEMENT OF UNCONTESTED FACTS

Petitioner, a practicing attorney who is representing herself *pro se* in this action, was an in-house attorney for Respondent from October, 1976 until her discharge, effective January 21, 1982. Petitioner joined the Legal Department of Continental Forest Industries ("CFI"), one of Respondent's subsidiaries, in October, 1976. Her starting salary was $26,000 per year, which was more than she had earned at Scott Paper, her prior employer.

Petitioner's promotion history while employed by Respondent was notably positive. In four years, Petitioner moved from a position as Assistant General Counsel at a subsidiary to a position as Securities Counsel in the Corporate Legal Department. Her salary doubled from $26,000 to $52,500. Her final salary in 1981 was $57,500, almost 120% more than her initial salary and above that of other white males with similar years of experience in the legal department. *See* Pet. App. 31-38.

In 1979, Petitioner moved to the Corporate Legal Department where she was appointed Corporate Counsel II, or senior attorney. Seven months later, Petitioner was offered her choice of two positions, either the second ranking legal position at Continental Diversified Industries ("CDI") or a specialized position in securities law in the Corporate Legal Department. Petitioner chose the latter and was named Securities Counsel in

November, 1980. By this time, Petitioner's salary leapt from $26,000 to $52,500, and she had been promoted from Assistant Group Counsel of a product company to Securities Counsel in Respondent's Corporate Legal Department, all in the short span of four years. *Id.*

A series of particularly disruptive events in January, 1982, forced Respondent to terminate Petitioner. In early January, Petitioner's superior received reports from two highranking Respondent executives who were Petitioner's clients regarding episodes where Petitioner had acted so unprofessionally and erratically that they refused to work with her again. In one of these episodes, Petitioner unilaterally "fired" Wilkie, Farr, the outside law firm hired by the General Counsel and "hired" another outside law firm without consulting her superiors. *See generally* Pet. App. at 14. At the same time, Petitioner's relationships with her peers and supervisors in the Corporate Legal Department had deteriorated to a point where it was difficult for them to continue working with her. Petitioner demanded that specific attorneys be assigned to work for her on certain projects, reflecting a fundamental misunderstanding of her position as one among equals in the department. She also began to berate her supervisor for subverting what Petitioner perceived as her "supervisory responsibilities." *See* Pet. App. at 37. Petitioner's intractability and insubordination resulted in her termination.

Petitioner Distorts The Facts

Petitioner recites a litany of facts in her petition, already thoroughly reviewed by the courts below. Petitioner does not dispute the facts themselves so much as she disputes the meaning of them. Pursuant to Rule 15, we call specific attention to the most egregious.[1]

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1. Petitioner's rambling, five page statement contains many fact (Cont'd)

(Cont'd)
mischaracterizations. We have tried to address most of these below:

Petitioner states that she was the only attorney that was ever summarily terminated without a written warning that her conduct subjected her to termination. *See* Pet. Brief at 11. In fact, Bermas, Petitioner's supervisor, called Petitioner to his office to discuss her accelerating disruptions of the Department. He informed her that her unprofessional behavior would not be tolerated. Bermas prepared a written warning but was not able to find Petitioner to deliver it. After Petitioner did not appear for work, Bermas terminated her employment. *See generally*, Pet. App. at 40.

Petitioner states that Respondent maintained a policy of hiring and promoting in its Legal Department based on sex and race. *See* Pet. Brief at 12. While Respondent vehemently denies ever limiting its applicant pool or its candidates for promotion by either race and gender, these "facts" as alleged by Petitioner are completely irrelevant and of no legal consequence to her claims. In actuality, the facts Petitioner alleges support Respondent's position that it did not discriminate against blacks and women. Petitioner acknowledges that Respondent interviewed and selected blacks and women for positions in the Legal Department — an argument directly contrary to her claims of discrimination.

Petitioner states that she presented evidence that Respondent intentionally violated equal employment opportunity laws as evidenced by other suits involving the Respondent. *See* Pet. Brief at 13. Petitioner's reference to these suits is emblematic of her ability to distort the facts as none of the named entities even employed the Petitioner. Moreover, the cases arose in circumstances so different as to have no relevance or probative value. Two of the cases involved the application of a settlement agreement, one involved a complaint of sexual harassment and the other involved seniority systems at a paper mill. *See* Brief of Defendant-Appellee, Docket No. 95-7497 at 27.

Finally, Petitioner states that she submitted a report authored by Respondent's Personnel Director which concluded that, from the viewpoint of African American employees, pay and promotions were not available on
(Cont'd)

1. *Salary.*

Petitioner states that at every point in her five year employment her salary was less than similarly situated white males. *See* Pet. Brief at 14. This is not just a mischaracterization — it is patently false. Despite two opportunities to do so, Petitioner has never rebutted Respondent's business documents which indicate that in 1980 and 1981 Petitioner made *more* than two white male attorneys with the same or more years of legal experience.[2] As to those attorneys who earned a greater salary, Respondent has offered ample unrebutted evidence that each lawyer to whom Petitioner compares herself had considerably more experience.[3] *See* Pet. App. at 21. These facts are not in "dispute" and Petitioner offers nothing to prove that this legitimate reason for the salary difference is pretextual. *Id.*

2. *The Management Incentive Plan* ("MIP").

Petitioner alleges that the Second Circuit "ignored Respondent's actual business records and admissions" in reviewing the fact that Petitioner, unlike prior lawyers in the

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(Cont'd)
an equal basis. *See* Pet. Brief at 14. In fact, in its opinion, the Second Circuit wrote that the report "resulted from a study in 1978 designed to assist the corporation in retaining black employees. Its indication of a belief that at that time blacks were undergraded and underpaid has little or no probative value on the issue of the corporation's motivation . . ." nor does it "demonstrate that [Respondent's] profferred non-discriminatory reason for modifying the MIP program was pretextual." *See* Pet. App. at 25.

2. In fact, Mr. Bailey and Mr. Cunnane, both white males in 1981 received respectively, approximately 7,000 and 11,000 dollars less than did Petitioner. *See* Brief of Defendant-Appellee, Docket No. 95-7497 at 14.

3. As the Second Circuit notes, each of the individuals compared had been out of law school substantially longer than Petitioner and their salaries were greater as a result. *See* Pet. App. at 21.

Legal Department, did not receive a Management Incentive Bonus ("MIP") when she achieved a grade of C-2. *See* Pet. Brief at 13-14. This is hyperbole. Far from ignoring this issue, the Second Circuit specifically addressed the MIP, devoting almost four pages of its decision to a careful analysis of Petitioner's claim, ultimately finding that Respondent changed the eligibility requirement for the MIP prior to Petitioner's eligibility and that this decision was uniformly applied, including the exclusion of another white attorney at Grade C-2. *See* Pet. App. at 21-25. To state that because the Second Circuit did not agree with Petitioner's conclusion, it "ignored" evidence is a gross mischaracterization.

3. *Retaliation.*

Petitioner denies that she engaged in the insubordinate conduct outlined in her January 20, 1982 termination letter. *See* Pet. Brief at 9-10. This is again a mischaracterization. Specifically, Petitioner states by submission of an affidavit, that she did not, in direct conflict with her supervisor's order, tell Wilkie, Farr & Gallagher to cease doing due diligence. *See* Pet. Brief at 9. But Petitioner does not and cannot deny that Wilkie, Farr called Petitioner's supervisor, Stephen Bermas, to say that Petitioner had directed the firm to discontinue the due diligence. Nor does she deny that a second law firm phoned Bermas to say that it had been retained by Petitioner to perform the due diligence. *See* Pet. Brief at 10. Taken in the best light, Petitioner is saying that she did not consider her own behavior to be insubordinate. This is not enough to satisfy her burden.

Similarly, Petitioner claims that she did not force Patricia Heck to relinquish the only word processor on which Heck was working to meet a deadline. *See* Pet. Brief at 10-11. But, Petitioner does not deny the incident occurred or that she engaged in the conduct. She merely concludes that she believes

the conduct was not disruptive and that she had a good reason for her conduct. *See* Pet. Brief at 10. While Petitioner may disagree with the assessment of her behavior, to deny that it occurred is another mischaracterization of the facts.

Finally, Petitioner claims that Respondent's assertion that she refused to discuss her work assignments and her treatment of others with Bermas on several occasions is countered by four memoranda written to Bermas. *See* Pet. Brief at 11. This is a blatant distortion. The memoranda Petitioner points to show a departure from a practice of collegiality and face-to-face resolution of workplace issues and an attempt to bypass her immediate supervisors.

In sum, there is no indication that the District Court or the Second Circuit failed to consider all the facts presented. Petitioner's own self-serving assertions about the meaning of her evidence do not support review by this Court.

REASONS FOR DENYING THE WRIT

Petitioner presents two questions in her petition for writ of certiorari. The first pertains to her claims based on Title VII and the second arising from her § 1981 claims. Neither question warrants review from this Court.

I.

THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON PETITIONER'S TITLE VII CLAIMS.

Petitioner's request for review rests on an amalgam of arguments. Honed to their essence, Petitioner believes: (1) that she submitted evidence of pretext which the lower courts

ignored; (2) that the Second Circuit misunderstood the summary judgment standard articulated in *Anderson v. Liberty Lobby*; (3) that under *Hicks* proof of pretext alone defeats summary judgment; and (4) that all the other Circuits except the Second (and perhaps the First) accept this proposition. *See* Pet. Brief at 22. The sum of Petitioner's contentions is that the courts below were wrong and she should have survived summary judgment.

However, the decisions below rest on a straightforward application of the summary judgment standard, articulated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), to an employment discrimination case. Applying the three-step burden shifting analysis enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), the lower courts determined that liability under Title VII could not be imposed absent evidence that Respondent treated Petitioner differently than others similarly situated or had a retaliatory motive in terminating her from her position. *See* Pet. App. at 1, 29. Both the District Court and the Second Circuit properly concluded that Petitioner provided insufficient evidence to support a reasonable inference that Respondent's proffered reasons for its employment actions were pretextual.[4] Here, where there is no circuit conflict nor a mistake by the Court of Appeals, further review is not warranted.

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4. The Court of Appeals never reached the issue of whether Respondent's legitimate business articulations were a pretext for *discrimination* under *Hicks*. Indeed, the Court of Appeals found that Petitioner merely *attempted* to show pretext "by asserting her personal belief that she was the most qualified person for [the promotions]." *See* Pet. App. at 10, 12. The Second Circuit found that Petitioner presented no evidence of pretext to show her termination was retaliatory, noting that Petitioner did not rebut that she received a raise after filing her first complaint with the CCHRO. *Id.*

A. THE DECISION BELOW IS CORRECT BECAUSE THE PETITIONER ADDUCED NO EVIDENCE OF PRETEXT.

Petitioner continually asserts that both the District Court and the Second Circuit wrongly decided this matter, ignoring "genuine issues of material fact." *See* Pet. Brief at 17-21. In so saying, Petitioner betrays a fundamental misunderstanding of what it means to have a genuine issue of material fact. Petitioner apparently believes that the mere proffer of her own opinion in a form permissible under Federal Rule of Civil Procedure 56(e) ends the inquiry — that summary judgment cannot enter for the employer. *See, e.g.*, Pet. Brief at 19. Here, the Court of Appeals properly required evidence beyond Petitioner's own self-serving assessment to rebut the legitimate business reasons for the actions taken.[5]

The Court of Appeals correctly applied the summary judgment standard. *See* Pet. App. at 9. A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986). Only the substantive law can determine which facts are material. *Id.*; *Gallo v. Prudential Residential Services.*, 22 F.3d 1219 (2d Cir. 1994). The substantive law, Title VII, requires a plaintiff to prove that the employer took the personnel action at issue "because of [plaintiffs] race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). This Court established an allocation of the burden of production and an order for the presentation of proof in discrimination cases. *McDonnell*

5. The Court of Appeals specifically noted that Petitioner's "attempts to show pretext by asserting her personal belief that she was the most qualified person for the various positions . . . were ineffective," concluding that "[h]er opinion is belied by the facts. . . ." *See* Pet. App. at 12.

Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). However, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993).

Here, the Court of Appeals applied the correct standard to *McDonnell Douglas* and *Hicks* and reviewing all the evidence *de novo* concluded that Petitioner failed to show that Respondent's reasons were false. *See* Pet. App. at 11, 13, 14. Simply put, Petitioner failed to establish pretext. Unhappy with the result, Petitioner summarily concludes that the Court of Appeals ignored the standard articulated in *Anderson* — that it improperly provided a special standard under *Hicks* by abruptly ceasing its inquiry at the point Respondent articulated a legitimate business reason for its actions. *See* Pet. Brief at 20. This is not the case. Both the District Court and the Second Circuit sifted through facts finding that none rebutted Respondent's articulated business reasons. The summary judgment standard articulated by this Court was properly applied.

B. *ST. MARY'S HONOR CTR. V. HICKS* REQUIRES AFFIRMATIVE EVIDENCE OF DISCRIMINATION.

Equally erroneous is Petitioner's assertion that, under *Hicks*, pretext alone constitutes legally sufficient evidence of discrimination. *Hicks* teaches that "a reason cannot be proved to be a pretext for discrimination unless it is shown *both* that the reason was false and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993). At summary judgment, the plaintiff must establish a genuine issue of material fact as to whether the employer's reason is false *and* as to whether it is more likely than not that a discriminatory reason motivated the employer to make the

adverse employment decision. *Gallo v. Prudential Residential Serv.*, 22 F.3d 1219, 1225 (2d Cir. 1994). *See also Woods v. Fuchon Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994); *Runnebaum v. Nationsbank of MD, N.A.*, 95 F.3d 1285, 1293 (4th Cir. 1996); *Grimes v. Texas Dept. of Mental Health*, 102 F.3d 137, 141 (5th Cir. 1996); *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996); *Nidds v. Schindler Elevator Corp.*, 104 F.3d 854, (9th Cir. 1996) *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442-43 (11th Cir. 1996). In its decision, the Second Circuit correctly enunciated that once the defendant satisfied the burden of production — articulating a "legitimate, clear, specific and non-discriminatory reason for" the challenged action — the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for discrimination. *See* Pet. App. at 10.

Petitioner would like this Court to grant certiorari based on her notion that the Court of Appeals misunderstood *Hicks*. *See* Pet. Brief at 20-22. Contrary to this claim, the Court of Appeals decision is fully in accord with *Hicks*. In *Hicks*, this Court held that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Hicks*, at 514-515. If, as here, the employee cannot adduce evidence to support a finding that the employer lied, summary judgment may enter.

The Second Circuit found the employer's explanations for the employment actions it took to be legitimate. *See* Pet. App. 11, 14, 25. Petitioner believes the Court of Appeals finding is wrong. And so, the Petitioner grasps on to the one sentence in *Hicks* as support for a pretext only rule: "the fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of

mendacity) may, together with the elements of a prima facie case, suffice it to show intentional discrimination." *See* Pet. Brief at 21 (quoting *Hicks*, 113 S. Ct. at 2749.) But that sentence at best means only that where a prima facie case itself supplies the requisite affirmative evidence of discrimination, no additional evidence of discrimination is required *after* pretext has been demonstrated. Pretext alone is not enough. The " 'ultimate question [is] discrimination vel non.' " *Hicks*, 113 S. Ct. at 2753 (quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983)).

Even if this Court agreed with Petitioner and ruled that her burden was only to rebut Respondent's stated reasons for its action, Petitioner failed to do even that. Thus, if we applied Petitioner's pretext-only rule, summary judgment would enter.

C. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

Petitioner urges review because the decision of the Second Circuit alone ostensibly conflicts with "the law in every other circuit". *See* Pet. Brief at 25. As an initial matter, half of the circuit court decisions upon which Petitioner relies in support of her claims are pre-*Hicks* decisions and can shed little to no light on to a "pretext" versus "pretext plus" discussion.[6] Of more

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6. Petitioner relies on pre-*Hicks* cases from the Third, Ninth and Eleventh Circuits. Post-Hicks, these same circuits have applied exactly the same analysis as articulated both in the Second Circuit and *Hicks*. *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996) (holding that Title VII requires that, in addition to proving pretext, employee also must prove that the employer was motivated by a discriminatory purpose); *Nidds v. Schindler Elevators Corp.*, 103 F.3d 854 (9th Cir. 1996) (employee's age claim where plaintiff fails to establish employer's reasons for termination (Cont'd)

importance, the post-*Hicks* cases do nothing to repudiate that there must be affirmative evidence by a plaintiff presented "at some point in the *McDonnell Douglas* order of proof from which the fact finder can reasonably infer that the defendant intentionally discriminated against the plaintiff." *St. Mary's Honor Ctr v. Hicks*, 509 U.S. 502 (1993). Even Petitioner's cases hold that, as part of the prima facie case or as pretext-plus, there must be affirmative evidence from which a jury could rationally find that the plaintiff was a victim of intentional discrimination or retaliation. Contrary to Petitioner's assertion that her evidence was ignored, the Second Circuit carefully reviewed the information presented and found that Petitioner had failed to adduce such affirmative evidence. The conflict claimed by Petitioner is specious.

Additionally, the two post-Hicks cases cited to by Petitioner do not support a showing of conflict between the circuits. In *Kowalski v. LIF Prods.*, 82 F.3d 1283 (3d Cir. 1996), the Third Circuit addressed whether an employee was protected against retaliation under the scope of § 510 of the Employment Retirement Income & Security Act ("ERISA"). The Third Circuit reversed a grant of summary judgment in favor of the employer because the plaintiff raised: (1) a genuine issue of material fact that contradicted the employer's proffered explanation; *and* (2) evidence which could be used to show that the employer's specific intent was to violate ERISA. Kowalski's prima facie case was such that it raised affirmative evidence of retaliation. This is not in conflict with the *Holt* decisions below; Kowalski had evidence of discrimination, Petitioner did not.

(Cont'd)

constituted pretext for discrimination); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996) (holding that former employee in age claim failed to provide sufficient evidence to rebut employer's legitimate, non-discriminatory reason).

Similarly, in *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498 (5th Cir. 1994), plaintiffs claimed that they were discharged in retaliation for reporting incidents of sexual harassment. The Fifth Circuit properly identified the standard under *Hicks* — that the plaintiffs must prove that the legitimate reason articulated by the defendant was false and that the defendant's real reason for discharge was prohibited under Title VII. *Id.* at 275. The Fifth Circuit began the burden shifting analysis, then remanded the case to develop an analysis on the facts of causation, the third prong of the prima facie case. This is completely in line with the standard used by the Second Circuit in its analysis of Petitioner's claims and its finding that Petitioner had adduced no evidence of discrimination. Petitioner's own cases do not support any meaningful conflict among the circuits; her petition should be denied.

II.

THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S SECTION 1981 CLAIMS AS UNTIMELY.

Both the District Court and the Court of Appeals correctly found that Petitioner's § 1981 claims are time-barred, having arisen more than three years prior to the filing of the Complaint. In dismissing the § 1981 claims, both courts properly determined that the Connecticut "savings" statute, Conn. Gen. Stat. § 52-592 (1993), does not apply to Petitioner's Complaint. Petitioner's prior action for injunctive relief was dismissed squarely on the merits for failure to demonstrate irreparable injury necessary for injunctive relief, not for purely procedural reasons as required to save an action under the statute. *Legassey v. Shulansky*, 28 Conn. App. 653, 659, 611 A.2d 930, 933 (1992); *Masterson v. Atherton*, 328 F.2d 106, 108 (2d Cir. 1964); *see also Lacasse v. Burns*, 214 Conn. 464, 472, 572 A.2d 357, 361 (1990).

Further, since Connecticut procedural rules do not apply in federal court, Respondent's failure to cite specifically the borrowed statute of limitations in its answer does not preclude it from raising this defense.[7] Federal courts must apply a state limitations period to a federal civil rights action, including an action brought under § 1981. However, when borrowing state statutes of limitations for application to federal civil rights claims, federal courts borrow only what is necessary to fill gaps or deficiencies in federal law, and only so much of state tolling and application provisions as are integral and essential to a limitations scheme. *Lewellen v. Morley*, 875 F.2d 118, 121 (7th Cir. 1989). There is no deficiency in federal procedure that *Connecticut Practice Book* § 109A is needed to fill since Fed. R. Civ. P. 8(c) establishes requirements for the pleading of affirmative defenses, such as statutes of limitations.

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7. *Connecticut Practice Book* § 109A, requiring the identification of a statute relied upon in a special defense, is not a substantive prescription. *Rowe v. Godou*, 532 A.2d 978, 981 (Conn. App. 1987), *rev'd on other grounds*, 550 A.2d 1073 (Conn. 1988). Furthermore, compliance is desirable rather than mandatory. *See also Hanover Ins. Co. v. Fireman's Fund Ins. Co.*, 217 Conn. 340, 586 A.2d 567 (Conn. 1991). Pursuant to the notice pleading requirements of Fed. R. Civ. P. 8(c), petitioner was on notice when Respondent filed its Answer, that Respondent was asserting a statute of limitations defense.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1260

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

VERONICE A. HOLT
Petitioner,

v.

KMI-CONTINENTAL, INC.
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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I. PETITIONER RELIES UPON FACTS ADMITTED TO BY RESPONDENT KMI

Respondent entirely ignores the fact that Petitioner's factual assertions in the proceedings below were based upon Admissions[1] sworn to by the Respondent, submitted in their entirety in Petitioner's moving papers in the Courts below, and ignored in their entirety by the Courts below. (Appendix to Briefs ("App.") 769-932).

Respondent KMI repeatedly stated its willingness to stipulate that "except for conduct such as that set forth in the January 20, 1982 letter from Bermas to Holt, neither the plaintiff's competence nor her performance were at issue."[2] Nonetheless, KMI continuously denigrates Petitioner Holt throughout its Brief.[3]

A. SALARY DISCRIMINATION

The quality of Respondent KMI's factual assertions are well illustrated by a constant emphasis on the alleged[4] 120

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[1] In the admissions, KMI is often referred to by its predecessors names, e.g. "Continental" or "CGI".

[2] See for example App.828, 829, 846, 847, 848, 849, 850, 854.

[3] KMI also stipulated that Holt was a "high potential employee" along with Conway and Sisley. (App.892, 894)

[4] KMI admits that Holt's salary was increased by $5,250 (10%) the day after she was terminated and that

per cent in salary increases. For example, in the chart below which covers the relevant period 1976-1982, Rein received both the highest dollar increase and percentage increase. While Sisley had a lower dollar and percentage increase, his salary was still $17,000 greater than Holt's before his bonus. [5]

ATTORNEY	$INCREASE	PERCENT
Rein	$84,000.00	184.61%
Bermas	$48,500.00	78.86%
Conway	$42,496.00	121.40%
Holt[6]	$31,500.00	121.15%
Sisley	$24,503.00	54.45%[7]

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the increase was made effective November 1, 1981. (App.871-872)

[5] The data used to produce these figures is taken from salary summaries agreed to by the parties and submitted as an attachment to Holt's Motion for Summary Judgment. (App.488-506)

[6] $7,000 of this increase was to rectify prior salary discrimination. While at CFI Holt and a white male Gerald Rubin were in the same job with the same title and responsibilities. Yet Rubin's job grade was A16 and Holt's was A12. (App.791-794)

[7] Respondent also attempts to mislead this Court by asserting by arguing that Bailey and Cunane, twowhite male attorneys, made less than Holt. Bailey and Cunane were in a lower job grade and salary classification.

As demonstrated by KMI's admissions below, Holt's comparatively low salary was the product of deliberate conscious decision making. KMI admitted that:

3. Effective April 1, 1980, Holt received a salary range classification of C-2.

4. The salary range for the salary grade C-2 position was $48,100 to $72,100. The salary proposed for Holt was approximately $3,100 (6.4%) below the minimum salary range for the position as established by Continental. [T]he Salary Change Proposal [stated] that Holt's salary would be below the minimum range, but that J.S. Luci, Vice President -- Human Resources and Rein had "decided ... not to bring the employee (Holt) up to minimum at this time." (App.824-825)

B. THE MANAGEMENT INCENTIVE PLAN

The chart on page two grossly understates the salary differential between Holt and these white employees, all of whom received substantial bonus payments in excess of $10,000 pursuant to KMI's Management Incentive Plan (MIP). KMI made the following admissions regarding the MIP.

2. By memo dated April 13, 1978, Bruce Smart, President of the Continental Group, Inc. and Chief Operating Officer wrote *** (2) "B" level MIP to include all positions in grades C-1 through C-5.

3. The **Corporate Management Incentive Plan Guidelines for 1981 Participation** states:

"The basic determinant for participation level is the assigned grade in the salary structure. Current participation is determined by salary grade *** The grades and MIP levels are: *** B MIP (20% norm) - grades C-1 and C-5 (App.887-889)"

6. Holt was not granted participation in the Management Incentive Plan ("MIP"). ***

8. From 1/1/76 to 4/1/80, all attorneys in the corporate legal department with a salary grade C2 or higher were awarded participation in the Management Incentive Plan. (App.825-826) ***

16. **Holt was the first black person between 1976 and 1982 to be employed in a job with a salary grade of C2.** (App.894) ***

3. As of 1/1/1978, 53 of the Corporate staff employees were MIP/Bonus participants. 48 of 53 participants were white males. *** There were no black participants in the Management Incentive Plan. There were no black female participants in the Management Incentive Plan.

4. As of 1/1/79 *** 57 of the 62 participants were white males. *** One black male, William H. Moses [] was listed as a C-level MIP participant.

There were no black female participants in the Management Incentive Plan.[8] ***

6. As of 1/1/1980 *** 62 of the 67 MIP Bonus participants were white males. *** There were no black female participants in the Management Incentive Plan. [9] ***

12. *** All MIP bonus participants as of 1/1/1981 were white. 63 of the 64 participants were white males. There were no black participants in the Management Incentive Plan.

13. As of 1/1/1982, *** 61 of the 63 participants were white males. *** There were no black participants in the Management Incentive Plan.

14. As of 1/1/83 *** There were no black participants in the Management Incentive Plan.

15. As of 1/1/84 *** There were no black participants in the Management Incentive Plan. (App. 898-911)

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[8] Although KMI listed William Moses as a participant, KMI admits that a 1976 memorandum states "We had never given this incentive to Bill Moses..." (App.901)

[9] With respect to the one black male named a participant, Holt relied upon documents indicating he never received a bonus. Although KMI asserted that he received a bonus, it has not produced such records. (App.901-905)

C. TERMINATION OF HOLT'S EMPLOYMENT

Defendant admitted that:

1. On or about December 10, 1981, Holt filed a charge of employment discrimination with the [CCHRO] and [EEOC] alleging that Continental had retaliated against her for filing a charge of employment discrimination...***

2. The defendant states that its records indicated that in early January of 1982 Bermas asked Holt to give him a list of the work she could foresee taking place within her area of responsibility in the next six months and to approximate the amount of time each project would take.

3. On or about January 5, 1982, Holt sent a memorandum titled Filing Assignments to S. Bermas. ***

6. On January 8, 1982, Holt filed a written complaint to Continental's Personnel Department in a memorandum titled "Retaliation for Filing EEO Complaint."

8. By letter dated January 20, 1982 Bermas [Holt's immediate superior] informed Holt that she had been terminated. The letter stated the following reasons for her termination:

1. You have pre-empted Company facilities to work on a personal matter and delayed the work of another lawyer in the Department seeking to meet a deadline on an Company assignment.

2. Without consulting either Mrs. Rein or me, you called Willkie, Farr & Gallager and directed them not to perform work the General Counsel had specifically asked them to do.[10]

3. You called Skadden, Arps, Slate, Meagher & Flom to ask them to perform work previously assigned by the General Counsel to another law firm, again without consultation.[11]

4. You have insisted on setting your own work assignments without regard for my instructions and have interfered with the work assignments of other lawyers.

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[10] In fifteen years of litigation, KMI has never produced admissible evidence that Holt engaged in this conduct. Holt has steadfastly sworn under oath that she did not do this. On the one occasion when Holt subpoenaed the lawyer at Willkie Farr with whom she had the conversation, KMI successfully quashed the subpoena.

[11] KMI has never proffered any admissible evidence regarding these alleged conversations even though Skadden Arps defended KMI in the state proceedings.

5. You have refused on several occasion to discuss with me your work assignments and your treatment of others so that it has been impossible to maintain appropriate working relationships in the Department.

6. You have harassed other lawyers in the Department by dealing with them in an unprofessional, personally insulting manner.

7. Your behavior has taken up a disproportionate amount of your supervisors' time which should have been spent on more productive matters.

8. Without prior notice or approval, you have failed to report to work due to personal business.[12]

25. Between 1976 and 1982, no other attorney has ever been summarily involuntarily separated from employment in Continental's corporate legal department." (App.868-878)

Item number one in the termination letter is the memorandum that Holt typed to KMI's Personnel Depart-

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[12] Plaintiff was absent because her apartment was burglarized. The defendant was aware of Holt's absence and the reason for it. Indeed, her termination letter was sent to her sister's address in Washington, D.C. where Holt had gone to take a couple days off after returning home to find her house burglarized.

ment (App.240) to complain about her superiors efforts to remove her supervisory responsibilities from her job description after the filing of her charges. In a sworn affidavit, Bermas stated:

> "Holt's draft of a proposed job description has never been adopted by CGI. It is a document that she drafted herself because she insisted that she wanted her duties and responsibilities to be set down. " (App.241)

KMI now admits that on October 22, 1981, Bermas sent the job descriptions, including Holt's, to each of the lawyers employed on the corporate staff. (App.851) The description for Holt's position as Securities Counsel stated in part.

> "OVERALL RESPONSIBILITY for legal aspects of securities law compliance, financing matters and financial reporting. These functions are to be performed either directly or in a supervisory capacity." (App.852)

More importantly, KMI now admits "its records indicate that the criteria for [Holt's] performance review are similar to the objectives and responsibilities stated in the Securities Counsel job description." (See App. 866)

CONCLUSION

Holt presented substantial evidence, both direct and circumstantial, which demonstrated that she could meet her burden of proof pursuant to ***St. Mary's Honor Society v. Hicks,*** 509 U.S. 502 (1993) and ***Anderson v. Liberty***

Lobby 477 U.S. 242 (1986). This Court should grant the writ and reverse the decision of the Second Circuit. The fair enforcement of Title VII requires that lower courts not define the truth for summary judgment purposes as being limited to what the employer states.

April 27, 1997

Respectfully submitted,

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